CASES

ARGUED and DECREED

IN THE

High Court of Chancery,

From 1676 to 1706.

By the HONOURABLE

RICHARD FREEMAN, Esq;

Late Lord Chancellor of *Ireland*.

Revised and Published

By *THOMAS DIXON* of *Gray's Inn*, Esq;

In the SAVOY:

Printed by HENRY LINTOT, (Assignee of *Edw. Sayer*, Esq;)

MDCCXLII.

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DE

DE
Term. Paſchæ
1676.
In Curia Cancellariæ.

Executors of the Lady Croft *verſus* Lyndſey and Covill. (1.)

IN the Caſe of Lyndſey and Covill, it was admitted that an Adminiſtrator or Executor in ſome Caſes, though he committed a Devaſtavit in Law, might be relieved in Equity; as an Adminiſtrator in London, before the Fire, having Leaſes of Houſes, &c. and a great Surplus of Aſſets above and beyond what would pay Debts and Legacies, paid all as they were demanded; and after the Fire coming deſtroyed the Houſes, which was the greateſt Part of his Aſſets, and then a Debt upon a Bond ſtarted up, and the Adminiſtrator was relieved againſt this. Aſſets. Devaſtavit.

In caſe of a Legacy, it was admitted that it was not due till Demand, and the Executor or Adminiſtrator ſhould pay Intereſt but from the Time of the Demand; Et ſemble, that if no Demand be proved in the Cauſe, it will be from the Time of the Bill exhibited. Legacy.

Serjeant Maynard's Caſe. (2.)

L. C. Nottingh. Mſs. case, 1684. 4537.

HE bought an Eſtate of one J. S. and upon the Bargain it was agreed, that a Recovery ſhould be ſuffered within the Space of three Years, and he paying his Money before the Recovery was ſuffered, took a Bond of the

Uendor, that if ſo be the Recovery was not ſuffered in the Space of three Years, that the Serjeant reconveying the ſaid Lands ſhould be repaid his Money; the Uendor tenders a Recovery, but before it was ſuffered, a third Perſon makes a Title to the Land, and thereupon the Serjeant exhibited his Bill to have his Money repaid. In this Caſe it was ſaid by Mr. Attorney, that if a Man ſell another's Land, and covenant to diſcharge it of ſuch particular Incumbrances, and before the Payment of the Money other Incumbrances are diſcovered, this will prevent any Suit for the Money till all the Incumbrances are diſcharged.

Incumbrances diſcovered before Money paid.

It was ſaid likewiſe by Mr. Keck, that if there be no Covenants againſt any Incumbrances, yet, if before Payment of the Money any are diſcovered, the Party may retain his Money till they are cleared; quod fuit conceſſ. per Cancellar'. But it was ſaid by Sir John King, and not denied per Cur', that thoſe muſt be Incumbrances made by the Uendor himſelf, or otherwiſe the Party cannot detain the Money, unleſs they be covenanted againſt. But in this Caſe the Lord Chancellor ſaid he could give no Relief; for here the Serjeant hath parted with his Money, and taken a Bond for Repayment of it if the Recovery were not ſuffered in three Years time, he reconveying his Eſtate; and here the Recovery being ſuffered, he hath no Pretence by his own Agreement to have it repaid; and this Court cannot help him, unleſs it ſhould take upon itſelf, where any Man had a bad Bargain, or was cheated in his Title, to help him to his Money again; and here being no manner of Fraud or Surprize in the Caſe, if he be not helped by his Covenants, he will not be helped in Equity; but for the Matter of Reconveying, he held that if the Serjeant ſhould reconvey ſuch Title as he had from them, be it more or leſs, or none at all, yet being a Relative to convey, it would have been well enough; but here the Recovery being ſuffered according to the Agreement, though nothing paſſed by it, he held the Party had well performed his Agreement, and ſo no Reconveying nor Repayment of the Money to be made.

DE
Term. S. Trin.
1676.
In Curia Cancellariæ.

Sir Francis Hollis *verſus* Sir Robert Carr. (3.)

THE Defendant's Father was Tenant in Tail, and the Defendant was his eldeſt Son and Heir, and upon the Marriage of his Siſter with the Plaintiff, he and his Father enter into Articles to pay 5000 l. and to ſecure it in Manner following; and then in one of the following Articles there are theſe Words, viz. Whereas a Fine is intended to be levied, by the Defendant and his Father, of ſuch and ſuch Lands, they do Covenant and Agree that it ſhall be forthe Security of the ſaid Portion; the Defendant's Father dies, and the Eſtate deſcends to the Defendant; and the Plaintiff exhibits his Bill to compel the Defendant to levy this Fine; and upon this two Queſtions were made: Covenant.

1. Whether upon theſe Articles an Action of Covenant would lie? Vide poſt Caſe 64.

2. Admitting that it will lie, whether upon the whole Matter it be proper for this Court to compel the Execution of this Agreement by levying the Fine, or to leave the Plaintiff to his Remedy at Law for Damages.

To the firſt Queſtion, It was argued by Serjeant Maynard, that an Action of Covenant would well lie, for he laid it for a Ground, and it was agreed by the Lord Chancellor and the Counſel of the other Part, that wheresoever there is an apparent Agreement of the Parties that an Act ſhall be done, though there be no expreſs Words of

of Covenant, if the Parties ſet to their Seals, yet it will amount to a Covenant; and he cited the Caſe of Maynard and Norwood, Hil. 13 Car. Rot. 1091. where there was an Agreement for the Payment of Money, and then theſe Words followed, viz. And it is the Intent of the Parties that it ſhall be ſecured by Bond; this was held to be a good Covenant; and Bret and Cumberland's Caſe, 1 Roll. 518. and Paſch. 20 Car. Rot. 221. Baſhall verſus Scott, Termor for 99 Years, if A. B. and C. ſhall live ſo long, grants over his Term, and there are theſe Words, And the ſaid C. is living, held a good Covenant.

1 Rol. 519.

And the Attorney General and Solicitor, who argued on the other Side, agreed all thoſe Caſes, becauſe there it doth appear, that there was an Agreement of the Parties, and he agreed the Caſe of Walker and Walker, 1 Rol. 519. and he ſaid in Indentures of Apprenticeſhip, there are no Words but the ſaid J. S. ſhall do ſo and ſo, and yet it was always held a good Covenant.

But here appears no Agreement, only a Recital, that it is intended that a Fine ſhall be levied, and that ſhall not make a Covenant, for it is almoſt in every Marriage Settlement, Whereas a Marriage is intended to be ſolemnized, &c. and yet if one of the Parties will not marry, no Action of Covenant will lie.

But to that it was anſwered, That the Caſes are not alike, for here in the precedent Articles there is a Covenant to give further Security, and then come in theſe Words, and ſo taking all together, certainly the Intent of the Parties doth well enough appear.

And to this firſt Point, it was held by the Lord Chancellor Finch, that an Action of Covenant would well enough lie upon theſe Words, for taking all together by coupling the Covenant to ſecure with this Article, it is very plain that it was intended by the Parties; and he ſaid whatſoever doth amount to a Collective Intent to do an Act under Hand and Seal, will make a Covenant; as a Leaſe made yielding and paying a Rent to a Stranger, though the Reſervation be void, yet an Action of Covenant will lie.

1 Rol. 519.

Agreement executed in Specie.

To the ſecond Queſtion, it was argued that the Party ought to be left to his Remedy at Law for Damages, and not to compel the Execution of the Agreement, becauſe when the Defendant ſealed theſe Articles he had no Eſtate in him, and if he had levied a Fine, it could only have wrought by Eſtoppel to extinguiſh a Right, and though he

hath now an Eſtate in him, yet he ought not to do it, having no Eſtate in him at the Time of the Articles; and this may be dangerous in reſpect that it is ten Years ſince the Sealing of the Articles, and there may be Incumbrances that by this Means would be avoided, and here the Plaintiff may have his Action of Covenant, and ſatisfy himſelf by the perſonal Covenant; and Mr. Solicitor cited Sir Richard Minſhall's Caſe, where there was a Covenant, that all Fines to be levied ſhould be to ſuch Uſes, and afterwards a Fine is levied and other Uſes declared; and it was held that an Action of Covenant would well lie. Fine to Uſes.

But the Lord Chancellor decreed the Levying of the Fine, for although the Defendant had no Eſtate in him at the Time of the Articles, and ſo if the Bill had been then exhibited, it was not in his Power to have done it, yet that is no Reaſon why he ſhould not be compelled to do it, now it is in his Power; and it may be a Queſtion whether or no, if a Purchaſer came in without Notice, the Lands ſhould be bound by this Agreement in Equity; and ſo it was decreed that the Fine ſhould be levied.

And it was ſaid in this, Caſe that if a Man covenants to do a Thing that is not in his Power, this Court will lay him by the Heels.

Bulſtrod *and* Letchmere. (4)

IT was ruled in this Cauſe, upon a Demurrer to a Bill exhibited for the Diſcovery of Deeds in the Defendant's Poſſeſſion, and of the Contents of other Deeds which he had ſeen of Mr. Dingley's Eſtate, that the Defendant being a Counſellor at Law ſhall not be bound to anſwer concerning any Writings which he hath ſeen, nor for any Thing which he knoweth in the Cauſe as Counſellor; but if any Thing came to his Knowledge before he was a Counſellor, or upon any other Account, he ſhall have the Privilege of the Bar, and is not obliged to anſwer; but a Caſe was cited in Bridgeman's Time, of Morris and Clayton, that they being but Scriveners ſhould not have that Privilege; and the Lord Chancellor made it a Doubt, if a thing were revealed, under the Condition of Secrecy to one that was not a Barriſter, whether or no he would oblige him to anſwer. Privilege of a Barriſter.

(5.)

Joint-tenants. Note.

IT was held by the Lord Chancellor, that if two Joint-tenants exhibit their Bill in this Court, and one releases, this shall not in any Respect prejudice the other, but he shall proceed.

(5 b.)

Injunction.

AN Injunction will never be granted upon a Bill, and Affidavit to stay any Proceedings at Law, till the Defendant prays a Dedimus, or is in Contempt.

An Injunction upon a Dedimus must never be granted concerning the Possession, but only to stay Proceedings at Law, and Jordaine a Clerk of this Court was under very severe Censure for making out such an one.

(6)

Lord Gray's Case.

Trust. Father and Son.

Vide post Case 222.

HE purchased Lands in his eldest Son's Name; the Money was paid by him, but the Deed mentioned it to be paid by the Son, and an Acquittance was given for it to the Son; the Father took the Profits all his Life, and diverse Testimonies there were of each Side, some seeming to imply a Trust, and others the contrary: But here the Lord Chancellor laid down this Maxim, That when a Father purchases Land in the Son's Name, prima facie this shall be intended a Provision for the Son, and shall never be taken to be a Trust without most clear Evidence and Proof, unless some precedent Declaration can be proved; for if a Father purchases Land in a Son's Name, intending it a Provision for him, he shall not afterwards raise a Trust upon this for himself by any subsequent Declaration; but perhaps there may be such subsequent Circumstances as may imply a precedent Declaration; but in this Case he would give no Judgment, but persuaded an Accommodation.

Post Case 36, 212.

(7.)

Mortgages. Post Case 13.

IF A. B. and C. have three successive Mortgages of the same Land, and C. that is the last Mortgagee, buys in the Mortgage of A. the first Mortgagee, B. the second Mortgagee shall not be let into the Mortgage upon the Payment of the Money that was due to A. unless also he pay what was due unto C. unless C. had Notice of the

Mortgage unto B. before he took his Mortgage; for C. being in Poſſeſſion and having a Title at Law, Equity will not put him out unleſs Notice can be proved, for if he took a Mortgage, not knowing of the Mortgage to B. there was no Default in him.

And ſo it ſeems to me, that if A. have a Mortgage of Lands, that are afterwards mortgaged to B. if A. lends more Money afterwards upon the ſame Mortgage, he ſhall hold to ſatisfy himſelf both Sums, unleſs he had Notice of the Mortgage to B. before he lent the laſt Sum of Money.

DE

DE Term. S. Mich. 1676. In Curia Cancellariæ.

(8.) **Lord of Banbury's Case.**

L. l. 1. ch. C. 287. & L. Nottingham's Mss. Rep. 24520.

THE Lord of Banbury voluntarily makes a Lease for Ninety-nine Years, in Trust for raising 6000 l. for his Children, with a Power to revoke it with the Consent of his Lady and three more of her Friends; afterwards he having Occasion for Money, prevails with his Lady and the other three to consent to a Revocation, which they did so far as to charge it with 2000 l. which my Lord borrowed of Sir —— Huit, and then to be subject to the first Charge; afterwards his Lady dies, this being settled upon her for a Jointure, and the Jointure Settlement took Notice of this Power, and the Revocation, and the Mortgage to Sir —— Huit, but it did not appear either by the Mortgage to Sir —— Huit, or by the Jointure Deed, whether or no this Revocation was total or not.

First Point, Whether or no this first Settlement, being voluntary and with a Power of Revocation, should be held Fraudulent within the Stat. of 27 Eliz. or not; and as to that my Lord Chancellor held that it should not, because this was not an absolute Power in my Lord, but he must have the Consent of his Lady and the other three.

Fraud.

And upon that he took this Difference, that if a Man reserves such a Power, with the Consent of J. S. who is his own Relation, or one that may be supposed to be at

his Command, that ſhall be Fraudulent within the Statute; but if it be with the Conſent of others, as here it was of his Wife's Friends, who cannot be ſuppoſed to conſent but upon very good Grounds, there it will not be fraudulent.

And he cited Bennet's Caſe, 19 Jac. where it was adjudged, that a Grant of an Annuity with a Power of Revocation, provided he ſettled another Annuity as good, was not within the Statute; and he ſaid in that Caſe the Lord Hobart held, that if it were a Power to revoke with the Payment of 20 l. only, that ſhould make it not within the Statute.

Second Point: He held here was a ſufficient Notice, for Notice.
although the Conveyance, that mentioned the Revocation, did not recite it in hæc verba, yet when there was Notice of a Revocation, the Parties ought at their Peril to inquire into the Execution of it; and he ſaid it was held in my Lord Crawly's Caſe, that where there is Notice of a Power to revoke, the Parties at their Peril muſt look to the Execution of it.

And he ſaid that where a Man doth, with good Advice, make an honeſt Settlement for the Support of his Family, if it were not fraudulently made, it ſhall not be ſet aſide without great Circumſtances.

Wheeler *verſus* Whitall & al'. (9.)

Jo. Wheeler having five Daughters deviſes his Lands to William Wheeler his Son, and the Heirs Male of his Body, Remainder to William Wheeler and his Heirs, upon Condition that he ſhould pay 500 l. to ſuch of his Daughters as ſhould be then living.

And if Sir William Wheeler ſhould refuſe to pay the 500 l. then he deviſed it to his Daughters and their Heirs.

Sir William Wheeler dies, living William Wheeler the Son, who was Tenant in Tail, and deviſed this Reverſion to William, the eldeſt Son of his Couſin Jo. Wheeler of B. whereas his eldeſt Son was named Andrew; William Wheeler the Son dies without Iſſue; Andrew the laſt Deviſee refuſed to pay the 500 l. to the Daughters for three Years, but now profered to pay it, provided he might have the Land. In this Caſe two Queſtions were ſtirred. Miſnomer.

11 Co. 21. 2 Roll. 44.

3. Whether Andrew should take by the Devise, being misnamed? And for that it was held clearly that he should, because though his Christian Name was mistaken, yet there was Certainty sufficient to ascertain him, and that was so clear that the Counsel did not much insist upon it.

But the Great Question was, Whether or no, when Andrew had forfeited his Estate by Refusal to pay the Money, he should now in Equity be admitted to tender the Money and Damages, and be restored to the Estate, as a Mortgagor should in case of a Mortgage forfeited?

Forfeiture by Breach of a Condition.

And a Case was cited between Wallis and Grymes, where the Condition for Payment of the Money was precedent to the Estate; and yet, though the Money was not paid in Time, the Party was relieved here.

Another Case between Pulston and Pulston was cited, where a Devise was to his Wife, of Goods, &c. for the Payment of his Debts; upon Condition that, if A. did pay the Debts in such a Time, he should have them; A. did not pay the Money in Time, and yet he had Relief here for the Goods, upon Payment of the Money afterwards; because in these Cases the Condition is looked upon as a Security only for so much Money; and where it is so this Court will give Relief.

And Keck said that the Difference was taken by the Lord Chief Justice Hale, in the Case between Fry and Porter, between a Condition for Payment of Money and a collateral Condition; for where the Condition is collateral, as it was in that Case, not to marry without the Consent of such a Person, there the Marriage without Consent is an absolute Forfeiture, if there be a Limitation over, because there can be no Recompence given for that; but where it is for Payment of Money, though the Money be not paid at the Day, yet Payment afterwards with Damages is a Satisfaction.

And that was the Reason of the Case of Davis and Hatton, for that was a Marriage without Consent, and a Limitation over; and there this Court will give no Relief against the Person to whom the Estate is limited over.

But note; If there be no Limitation over, such a Condition is only in Terrorem.

And in this Case the Lord Chancellor held, that this Condition being for Payment of Money, although in Strictness of Law the Estate were forfeited by the Nonpayment of the Money, and although there were an express

Limitation to the Daughters, yet this was but as it were a Mortgage or Security of Money, and the Daughters being paid the said Money and Damages, they were at no Damage; and so decreed that Andrew paying the same should have the Land.

(10.)

Phillips *versus* Phillips.

s. c. Abr. Eq. Cas. 410. 1. Ch. Cas. 292. Temp. Finch. Rep. 240. & Nottingh. Mss. case n°. 595.

ONE W. P. was Uncle both to the Plaintiff and Defendant, and having lent the Defendant Two thousand Pounds, he makes his Will, and by it doth devise, that after his Debts paid, the Residue of all his Goods, Chattels, Debts, Shipping, &c. shall be divided betwixt the Plaintiff and Defendant, his Nephews, and makes the Defendant his Executor, and dies. The Question is,

Moiety devised.

1. Whether or no this 2000 l. should be thrown into Hotchpot amongst the Testator's Estate, to be divided betwixt the Defendant and the Plaintiff, with the Residue of his Goods, or whether the Defendant should not have a Moiety of the Residue, besides this 2000 l. because this Debt was extinguished, as was objected, by the Defendant's being made Executor?

1 Cro. 373.

And to this it was argued, that it should not, for although, as it was agreed, a Debt due from an Executor should be Assets in Law to a Creditor; and so in Equity, if a particular Sum were given for a Legacy, and there were not Assets besides, it should be Assets for this Legacy. But here it was urged by Mr. Attorney, that this Case differs from that, for there is an apparent Intent of the Testator, that the Legatee should have so much; but here is only a Devise of the Residue after Debts, and no apparent Intent that this 2000 l. should be computed in with the Residue; and then the Debt being in Law extinct, there is no Reason to revive it when no Intent of the Testator appears.

Assets.

But the Lord Chancellor held clearly that it should not be extinct, but should be cast in with the Residue of the Estate, especially in this Case, where Debts are particularly mentioned; and this was a Debt at the Time of the making of the Will; and if the Word Debts had not been in, I believe it would have been all one, but that made it more strong.

Contra in the Nottingh. Mss. see however Toml. 240.

And

Assets.

And it was averred in this Case, and agreed per Cancellar', that if an Executor have a Lease for Years, determinable upon the Life of J. S. which is by a reasonable Estimate worth 200 l. if the Executor will not sell this, but keep it, and J. S. dies in a short Time, yet he shall answer the Value of it at the Time of the Death of the Testator; for it was his own Fault that he would not sell it; and so on the other Hand, if he should keep it, and J. S. should live fifty Years, he shall answer for no more, because here is a contingent Gain; but it might have been a Loss; and as, if it had been damnum, he should have born it, so being Gain he shall receive it.

Household-Stuff. Post Case 73.

Another Point was, Whether Plate should pass by the Name of Household-Stuff; and it being Plate that was in common Use about the House, the Counsel would not stand upon it but that it should; but if it had been Plate laid up, it seemeth that it should not.

Property.

Another Point was, The Testator had lent the Plaintiff 400 l. and after did declare that he had given it him; whether this should be put in Hotchpot? And per Cancell' it shall; for if it were a Debt at first to the Testator, he shall not afterwards talk himself out of it.

(11.)

Money upon a Mortgage, whether the Heir or Executor shall have it.

Post Case 17, 144.

IN a Case between the Heir and Executor of a Mortgagee, who should have the Money due upon a Mortgage forfeited, which was made to the Mortgagee and his Heirs, It was declared by Lord Chancellor Finch,

1. That when, upon a Mortgage, Money is made payable to the Heir or Executor, there before the Day, or at the Day of Payment, the Mortgagor hath Election to pay it to which he pleaseth; but after the Day of Payment is over, and the Mortgage forfeited by Law, though Equity doth give the Mortgagor Relief, so as upon the Payment of the Money he shall have his Land; yet Equity will not revive the Election of the Mortgagor to pay it to the Heir or Executor; but then he shall be forced to pay it to the Executor, because it came out of the personal Estate of the Testator, and thither it shall return.

But if in the Mortgage neither Heir nor Executor be mentioned, then after the Death of the Mortgagee the Law determines it to be paid to the Executor.

And in this Case the Money was decreed to the Executor.

(11 b.)

Nota, That it was ſaid by Lord Chancellor, That if an Eſtate be made in Truſt for three Perſons, and two refuſe, the other ſhall have the whole Truſt. Truſtee refuſes. Jon. 419. Roll. 325.

But Serjeant Maynard held the contrary, and ſaid it was not like an Eſtate at Law paſſed by Deed, for there when one of the Parties refuſe, the Deed is void as to him. Sed quære differentiam.

Mr. Ruſhworth's Caſe. (12.)

IT was held that if a College Leaſe be mortgaged, and the Mortgagee renews his Leaſe, that this ſhall be for the Benefit of the Mortgagor, paying the Mortgagee his Charges; and per Lord Chancellor the Leſſee of a College, &c. hath a Tenant-Right in France and all other Places almoſt but here, and the College are bound to let him renew, but the Law is not ſo here; but however the Mortgagee here doth but graft upon his Stock, and it ſhall be for the Mortgagor's Benefit. Mortgagee renews a Leaſe.

Cockes *verſus* Sherman. (13.)

FIVE ſucceſſive Mortgagees of the ſame Land; the fifth Mortgagee buys in the three firſt Mortgages, and then exhibits his Bill againſt the Mortgagor to exclude him of his Equity of Redemption, and hath the Land decreed to him abſolutely. Subſequent Mortgagee buys in a precedent Mortgage.

In this Caſe it was held per Finch, Chancellor,

1. That the fourth Mortgagee had an Equity of Redemption, but yet he ſhould not be let in to redeem unleſs he ſatisfied the fifth Mortgage, which was ſubſequent to his, as well as the other three that were before it; for when a Purchaſer or Mortgagee lays out his Money bona fide, not having any Notice of the Incumbrances, he may fortify his Eſtate and Title as well as he can, and when he hath got a Title in Law in him, as here he hath by the precedent Mortgages, this Court will never take it away from him, without reimburſing him all his Money that he is out upon it. Ante Caſe 7.

Notice. And if the Purchaser have Notice of the Incumbrances at the Time when he buys in the precedent Mortgages, it is not material, so that he had it not at the Time of the Purchase.

2. It was held, that if there be two Mortgages, and a Man having Notice of them will come and purchase and buy in the first Mortgage, and so endeavour to defeat the second Mortgagee, in this Case the second Mortgagee shall be let in, upon Payment of the first Mortgage Money, without any Regard to the Purchase Money, for else by this Means any Man that is a second Mortgagee might be cheated, and have no Remedy.

3. It was held that the fourth Mortgagee was not concluded by this Decree, being never made a Party to it; and although here be a great Mischief on one Hand, that a Mortgagee after a Decree against the Mortgagor to foreclose him of his Equity of Redemption, shall never know when to be at rest; for if there be any other Incumbrances he is still liable to an Account; yet the Inconvenience is far greater on the other Side, for if a Mortgagee, that is a Stranger to this Decree, should be concluded, he would be absolutely without Remedy, and lose his whole Money, when perhaps a Decree may be huddled up purposely to cheat him, and in the mean Time (he being paid his Interest) may be lulled asleep, and think nothing of it; whereas on the other Hand there is no Prejudice but being liable to the Trouble of an Account; and if so be that were stated bona fide between the Mortgagor and Mortgagee, in the Suit wherein the Decree was obtained, that shall be no more ravelled into, but for so long shall stand untouched.

Another Point in this Case was, Here was a Judgment that was given by the Mortgagor, precedent to the fourth Mortgage, and was for Security of four hundred Pounds, but was satisfied before the fourth Mortgage was made, and the Bond delivered up upon which it was obtained, but after the fourth Mortgage made, the Condusor of the Judgment borrowed four hundred Pounds more, and three Years after the Lending of the Money, it was declared that this Judgment should stand for Security of that Money; and afterwards this Judgment was extended, and the fifth Mortgagee buys in the Extent of this Judgment.

Resolved, That this Judgment should be set aside as to the fourth Mortgagee, and should not stand in his Way, for when the Judgment was once satisfied, and kept a foot, it was in Trust for the Conusor; and when Money is advanced afterwards, and no Mention of this Judgment at the Time of the Lending, this Declaration afterwards shall not keep it on foot to defeat a Purchaser; but if so be the Creditor had lent this Money at first upon the Prospect and Security of this Judgment, perhaps it might have been otherwise.

DE

DE
Term. S. Hill.
1676.

In Curia Cancellariæ.

(14.)

Quadraginta pro Quadringentis.

A Bond was in Quadraginta libris, conditioned for the Payment of 180 l.

The Court decreed this to be good pro Quadringentis, by Reason of the Greatness of the Sum expressed in the Condition, though no Money was proved to be lent upon it.

And by Lord Chancellor, if it had been Quadragenta, it had been good in Law for 400 l.

And it being decreed good for 400 l. the Court said it should have all the Effects of a Bond, and the Obligor being Dead, in this Case they decreed it should charge the Heir as far as his Assets, as well as the Executor; and that it should be satisfied by the Executor before any Bond that Judgment was not obtained upon before the Day of pronouncing the Decree; but the Court admitted that Judgments upon Bonds obtained after the Subpœna, and before the Decree, should be preferred before it, though the Contrary was pressed.

And in this Case Keck cited the Case of Savage and Brown, where a Seal being broke off a Bond, this Court decreed it good, and that after it was decreed good it ought to have all the Effects of a Bond to charge an Heir, &c. But if Heirs be not mentioned in the Bond, this Court will not charge an Heir.

Lord Mulgrave *and* Sir Jo. Mounſon. (15.)

1. POINT, Whether, where there is Tenant in Tail of the Gift of the King, with a Remainder in the Crown, and he levies a Fine to the King, whether this be reſtrained by the Statute of 34 H. 8. Fine by Tenant in Tail.

And it was held per Cancellar', aſſiſted with the Lord Chief Juſtice North and Juſtice Jones, that it was not, but that this Fine ſhould bar the Iſſue; for it appears by the Preamble of the Statute, that it was made to prevent the Alienation by Tenant in Tail; that the Memory of the King's Bounty might be preſerved, and where the Eſtate comes wholly back to the King, there it is in the King's Power to preſerve the Memory of his Bounty, either by giving it back to the ſame Party, or what other Way he pleaſeth.

And the Lord Chancellor ſaid, this Point was adjudged in the Earl of Northumberland's Caſe, 5 Jac.

2. Point: The King leaſes a Manor and Mines, and withal grants that the Leſſee ſhall have the ſole Vending of Allom, reſerving out of the Premiſſes 10000 l. per Ann. to himſelf, and 1640 l. per Ann. to the Lord Mulgrave. Grant of the King.

The Queſtion was, Whether or no this Grant (being void for Part, viz. for the ſole Vending of Allom,) ſhall be void for the Reſt?

If it were in the Caſe of a common Perſon, it was held that it might be good for Part, and void for Part, although the Reſervation was intire; as the Lord Chancellor put the Caſe, if a Man Leaſe Land and a Stock of Sheep, and all the Sheep die, yet the Rent ſhall continue.

But it was urged here, that the King is deceived in his Grant, for here it is plain that he did intend to grant the ſole Vending of Allom, which he could not do. But Sir J. King took a Difference, where the King is miſtaken in Matter of Fact, there his Grant ſhall be void, but not where he miſtakes the Law, and cited the Lord Shandos's Caſe, 6 Co. 55. 1 Co. 43.

But the Court ſeemed to incline that the Grant was void, it appearing upon the Face of the Grant, that the King was deceived in the very Subſtance of the Grant, and the Rent being intirely reſerved out of the Whole. Sed Curia Adviſare vult.

DE
Term. Paſchæ
1677.
In Curia Cancellariæ.

(16.)

Cawkry *verſus* Parrett.

Power to a Wife to diſtribute the Eſtate as ſhe ſhould think fit amongſt the Children.

A. Leaves 1600 l. to his Wife, to diſtribute (if ſhe ſhould marry again) amongſt his Children as ſhe ſhould think fit, and dies, leaving three Daughters by her, and one by a former Venter; the Wife marrieth, and after Marriage diſpoſeth of 1450 l. amongſt her own three Daughters, and only 50 l. to the Plaintiff, who was a Daughter by a former Venter.

And it was argued at the Bar (and I think the Opinion of the whole Bar was) that theſe Words, as ſhe ſhould think fit, did give the Wife a Power of diſpoſing unequally, or elſe they muſt be void, and if they be once admitted, there can be no Bounds ſet to that Inequality; but ſhe may give as much as ſhe will to one, and as little as ſhe will to another; and for that they cited the Caſe of Auditor Oldiſworth and Sir William Juxon, Executor to the Archbiſhop, who left 1000 l. to be diſtributed by his Executors amongſt his Servants, as he ſhould think fit, having reſpect to their Quality and Condition; and he having ſome Peek againſt Oldiſworth (who was Secretary to the Archbiſhop) gave him but 50 l. and gave the Coachman 150 l. and Oldiſworth preferred a Bill in the Exchequer, but could have no Relief; which was ſaid to be a ſtronger Caſe than this, becauſe of the Words having Regard to their Qualities.

Poſt Caſe 101.

And it was said that the Marriage could not alter the Case; for a Feme Covert might execute a Power, might be Attorney to her Husband, and in some Cases, where she was Executrix, might sell to her Husband; which was admitted by the Lord Chancellor.

Mr. Attorney put this Difference, where a Trust was left to a Feme whilst she was sole, without any Mention of her Marriage, there if she married she lost her Power; but if she were Covert at the Time when the Trust or Power was given to her, she might execute it well enough.

But the Lord Chancellor set aside the Distribution upon this Ground, because when the Husband intrusted the Wife with this Power, his Design was, that by this Means the Children should be kept in Obedience and respectful to her, and if either should misbehave herself, it should be in her Power to chastise her; but this Reason fails when she marries again, and then it was the Intent of the Husband that she should make Distribution before she married. Vide post Case 121.

A

DE
Term. S. Trin.
1677.
In Curia Cancellariæ.

(17.) Rightſon *verſus* Overton.

Mortgage Money.

A. Mortgages in Fee to B. the Money not being paid at the Day, B. the Mortgagee enters, and lending the Mortgagor more Money, reinfeoffs the Mortgagor; Proviſo that if he did not pay 500 l. at the Day, that then he ſhould re-enter. B. the Mortgagee dies, the Heir of B. releaſes the Condition to A. the Executor of B. prefers his Bill againſt A. the Mortgagor and the Heir of B. the Mortgagee to have the Money. ~~Upon a Demurrer, Finch Lord Chancellor took~~ theſe Rules.

1. When a Man mortgages Land, with a Condition to be void upon Payment of Money at a Day, and neither Heir nor Executor is named, if the Party die before the Day, the Law conſtrues this Payment to be made to the Executor, for Littleton's Reaſon, becauſe this Money lent went out of the Mortgagee's Perſonal Eſtate, and thither it ſhall return. 1 Inſt. 209. b.

Ante Caſe 11. Poſt Caſe 144. If the Money be limited to be paid to the Mortgagee, his Heirs or Executors at ſuch a Day, there if the Mortgagee die before the Day, the Party hath his Election, if he pay it at the Day; but if he do not pay it at the Day, then it is expreſly limited to no Body; and this Court gives it conſtantly to the Executor upon that Reaſon.

And though it was urged by the Attorney General, that here the Mortgagor, by the Acceptance of the Reinfeoffment had extinguished his Equity, yet per Cancellar' this being originally a Mortgage, and being continued still for a Security of Money, there remains still an Equity for the Mortgagor.

And he said, if the Mortgagor had Election, any Time after the Day, to pay the Money either to the Heir or Executor, it would be very inconvenient, for then he would make his Markets, and he that gave most should have the Money; and it would be a Power not fit to be left in the Breast of the Chancellor to give it to one or the other, and therefore it always goes to the Executor.

It was said per Cancellar', that in some Cases this Court takes Notice of the Civil Law, and that is the Reason, why that, if a Man devises a Legacy to a Son or a Daughter, &c. provided that he or she marry with the Consent of the Executor, &c. if the Party marry without the Consent of the Executor, yet he shall have the Legacy in this Court; and the Reason why this Court decrees it so, is because by the Civil Law such a Condition annexed to a Legacy is void.

But if the Devise be, that, if he or she marries without the Consent of the Executor, J. S. shall have the Legacy, there this Court will give no Relief, but J. S. shall have it; but Mr. Attorney said that by the Opinion of several Doctors in a Case now depending the Civil Law is otherwise; and in this Case, though a Remainder be limited over, yet the Condition is only in Terrorem.

Condition *in Terrorem.*

Post Case 221.

Salisbury *versus* Baggett. (18.)

IT was held, that an Equity of Redemption would be barred by a Fine, if no Claim were made in five Years, and that an Entry into the Land would not serve, because the Entry is not lawful, but the Party must bring his Subpœna, or else he will be barred.

Equity barred by a Fine. Post Case 80. 2 Inst. 518.

And an Entry will in no Case serve the Turn but where the Party hath a Right of Entry; therefore if Tenant in Tail discontinue, and the Discontinuee levy a Fine, and then Tenant in Tail die, the Entry of the Issue in five Years Time will not serve the Turn, because his Entry is not lawful, but he must bring his Formedon in five Years, or else he will be barred.

And he said the Statute of 4 H. 7. 24. had altered the Common Law; for now an Entry of a Claim at the Foot of the Fine would not serve; but there must be now either an actual Entry or a Claim, for so it is appointed by the Words of the Statute.

(9.)

Statute of Limitation.

A Bill was preferred by a Shopkeeper against one that was about sixteen Years since his Apprentice, to have an Account of him; and the Bill set forth, that there were several Dealings betwixt him and the Plaintiff his Master, as well after his Apprenticeship as before; and the Defendant pleaded the Statute of Limitation.

And the Lord Chancellor held, that as to what was transacted during his Apprenticeship, it was a good Plea, and was not within the Proviso of the Statute, and besides his setting him Free had absolved him; but as to what was transacted afterwards he ordered he should answer; and he held that the Action of Account was not saved as to all Dealers, but to Merchants and their Factors, &c. because many Times their Factors continued long beyond the Seas.

(20.)

IN another Case, where the Statute of Limitation was pleaded in Bar to a Legacy demanded, due twenty Years since, Lord Chancellor held that a Legacy was not barred by the Statute, nor ever had been so held.

(21.)

Legacies charged upon Lands.

IF a Man gives a Legacy, and chargeth it upon Black Acre, although this be not sufficient to answer the full Value of the Legacy, yet it shall not be charged upon the Personal Estate.

And it was said per Cancellar', that if a Man deviseth 100 l. out of a Lease for Years, and the Lease be determined, yet the Legatee shall never resort to the Personal Estate for this Legacy.

(22.)

Feme Covert.

A Devise was made to a Feme Covert, and that her Husband should not intermeddle with it; the Husband and Wife are divorced Causa Sævitiæ; the Wife prefers a Bill against the Executor, and makes not the Husband a Party neither as Plaintiff nor Defendant, which

was pleaded by the Defendant, and alledged that the Husband ought to be a Party, or else he could not be sufficiently discharged, in case he should pay it.

And it was ordered that the Husband should be made a Defendant without Costs; and it was said that if a Legacy be devised to a Feme Covert, this is a Trust for the Husband, unless there be Negative Words to conclude him. See acc. 1 Ch. Cas. 94.

(22 b.)

Resolved, That if an Executor consent to a Legacy, and die before Probate, yet the Assent is good enough; ruled upon a Demurrer. Assent to a Legacy before Probate.

York *versus* Eaton. (23.)

A. and B. were Partners in Trade, and for Security of Money due to them upon the Account of their Trade, they take a Mortgage of a College Lease to them in both their Names; A. Assigns his Interest or Part to C. his Son, and then C. and B. do renew this Lease in their Names, and each of them payeth a Part of the Fine; and C. dies and the Executor of C. prefers this Bill against B. for his Share in this Term, which B. claimed wholly by Survivorship. Joint-tenants. Survivorship.

And for the Plaintiff, the Case betwixt Taylor and Fleming was cited, where two Persons take a Lease for Years, and each of them payeth a Moiety of the Fine; yet if one die, the Term shall wholly survive to the other; which the Lord Chancellor admitted, for there they run equal Hazards, and put it to the Venture which shall die first, and so they shall in all Cases of Joint-tenancy, unless an Agreement or a Trust, &c. be proved, and no Relief shall be had here without such Proof. 3 Rep. 238, 127.

But in this Case it appears, that this was originally a Security for a Debt contracted when A. and B. were Partners in Trade, and upon that Account, and by the Law this shall not survive, and then when A. assigns his Share to C. this shall not alter the Nature of the Debt; but if C. had died, then without Question his Executors should have had their Share, and here, notwithstanding the Lease is renewed, yet this is but as it were a Continuation of the same Security, and the Nature of it shall not be altered, but the Plaintiff who is Executor of C. the Son shall have his Share. 1 Inst. 182. b.

Hawley

(24.) Hawley *verſus* Cutts.

A is indebted to B. 300 l. B. by his Will gives A. an Annuity of 100 l. per Ann. and further ſays, Item, I give A. 300 l. in Money which he oweth me upon Bond, and then dies; and it happened that at that Time there was near 20 l. for Intereſt due beſides the 300 l. Principal; and the Queſtion was whether or no theſe Words ſhould give the Intereſt as well as the Principal to A.

It was agreed that if the Words had been, I give or forgive to A. the Debt of 300 l. which he oweth me, that would have carried the Intereſt as an Appendant to that Debt.

But here per Cancellar' it was decreed, that A. ſhould have only the 300 l. for that the Intereſt is a Fruit fallen from the Tree in the Life of the Teſtator, and he ſhall have the 300 l. barely as he gave it him. Sed quære differentiam between this and the Caſe agreed; and Mr. Attorney Jones ſaid he was clearly of the contrary Opinion.

It was likewiſe moved that the Annuity of 100 l. might be decreed to be paid Quarterly; but the Lord Chancellor ſaid, he would not alter the Payment of it any otherwiſe than it was in the Will.

(25.) Sir John Burlace *verſus* Cooke.

Shewing of Deeds. Poſt Caſe 74.

AN Heir exhibited a Bill for Diſcovery of Evidences concerning Lands that were his Anceſtor's; the Defendant ſwore that he was a Purchaſor of the Lands, and the Heir demanded a Sight of his Deeds and Writings; but per Cancellar', he ſhall not ſee them; for although the Heir prima facie hath a legal Title, he may go into a Court of Law if he pleaſeth, but this Court will not compel the Shewing of Writings to any Perſon, unleſs he hath an Equitable Title, as a Mortgagee, &c. and that is the Difference between a Legal and an Equitable Title.

(26.) Cloberry *verſus* Lampen.

Legacy when goes to the Executor.

A. Gives to B. 500 l. when ſhe ſhall attain the Age of 21 Years, or be married, which ſhall firſt happen, to be paid with Intereſt; A. dies, and B. dies before the Age

of twenty-one Years or Marriage; the Queſtion was, Whether the Executor of A. or of B. ſhould have the Legacy. Poſt Caſe 72; 98, 135.

And Reſolved, that the Executor of B. ſhould have it; for this is a preſent Duty, though the Solvendum be in futuro, and it is not a contingent Gift, as it would have been, if the Words to be paid with Intereſt had been omitted; for now it is all one as if he had ſaid, I give B. 500l. to be paid with Intereſt, when he ſhall attain the Age of twenty-one Years, or be married, which without Queſtion had veſted in B. and his Executor ſhould have had it if he had died.

And it was likewiſe ruled in this Caſe, that the Executor being of full Age ſhould have it preſently, for the Deſignation of the Payment of it at the Age of twenty-one Years, was by Reaſon of the Incapacity of the Legatee before that Time to manage it, which Reaſon ceaſes in the Executor; and when it is to be paid with Intereſt, it is the ſame Thing to the Executor, for it will be no Advantage to him to keep it in his Hands ſo long as he payeth Intereſt for it.

And Keck told me that he had known it ruled, that when a Legacy was given in that Manner to be paid without Intereſt, and the Legatee died before the Age of Payment, that the Executor had a Decree for it preſently, for that it is Debitum, though not Solvendum, preſently, and the Deſignation of the Time is by Reaſon of the Incapacity of the Perſon till then. Sed quære de ceo, car ſemble q' eſt un grand difference enter les Caſes; for here by the Will of the Teſtator the Intereſt goes to the Benefit of the Executor.

DE
Term. S. Mich.
1677.
In Curia Cancellariæ.

(27.)

Manaton *verſus* Squire.

Partition.

A Bill was preferred by a Tenant in Common, to have a Partition, upon a Suggeſtion that the other Tenants in Common had aliened to Perſons unknown, ſo that he could not tell againſt whom to bring his Writ of Partition; and alſo that the other Tenants in Common did with their Cattle eat up all the Profits, for which he had no Remedy at Law, &c.

In this Caſe it was held per Cancellar', that the Chancellor had equal Power to make Partion by Commiſſion, as the Common Law had by Writ of Partition; for it cannot be denied but by the Statute of 32 H. 8. a Tenant in Common hath a Right to Partition; and the Delays at Common Law many Times are ſuch, it being in a real Action (if the Demandant happen to bring his Writ againſt the Perſons that are not the Tenants, &c.) that he ſhall never attain the End of it; and he ſaid he did no more Queſtion the Juriſdiction of the Chancery in this Caſe, than he did, whether a Gift to a Man and his Heirs were a Fee-Simple, and granted a Commiſſion, unleſs the Parties could agree without before the next Term.

Jennings's Case. (28.)

Homine Replegiando.

UPON Affidavit made, that Jennings had got a young heiress into his Custody without the Consent of the Guardian, upon the Motion of the Attorney General, a Homine Replegiando was granted.

(29.)

Tithes.

1 C. 2. Chan. Cas. 237.

A Bill being preferred against a Quaker for Tithes, who refused to answer upon Oath, the Defendant was brought to the Bar, and having been brought three Times before, the Bill was taken pro Confesso, and referred to a Master to examine what was due, and to be armed with a Commission for that Purpose. And the Lord Chancellor declared, that this Court had Cognizance of Matters of Tithes as well as the Exchequer, and that the Plaintiff had Electionem fori.

DE
Term. S. Hill.
1677.
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(30.)

Ireton's Case.

L. C. Nottingh. MSS. case 785.

Custom of London. Vide post Case 78.

RESOLVED, That where a Citizen of London devises a Legacy to one of his Children, that notwithstanding that Child shall have his Share out of the Customary Part, unless it doth appear that by the Intent of the Testator that Legacy was to go in Satisfaction of his whole Share.

Baron and Feme. Chose in Action. 3 Rep. C. 182. Post Case 78, 331.

And it was likewise held per Cancellar', that if the Wife be intitled to her Customary Part, and the Husband dies, that the Executor of the Husband shall not have this, but the Wife, because it is a Thing in Action.

(31.)

Sir William Darcy's Case.

Payment by Recouper.

IT was held that if A. oweth B. 100 l. by Recognizance, and B. oweth A. 50 l. or 10 l. upon any Security whatsoever, and A. sues B. that B. cannot compel A. to pay himself by Way of Retainer out of what is due to him, but they must take their mutual Remedies, unless there were any Agreement to the contrary.

Forfeiture per Felo de se.

And it was likewise resolved in this Case, upon solemn Argument, that if a Man, that hath a Debt due from another by Recognizance, be a Felo de se, that this Re-

cognizance is forfeited to the King, and the Administrator of the Felo de se shall not have it; and if the King do grant a Pardon which extends to Debts (as in this Case the Act of General Pardon did) that this enures to the Benefit of the Debtor, and doth not restore any Interest to the Administrator. Pardon.

Draper's Case. (32.)

DRaper's Wife being possessed of a Brewhouse in Wandsor, for a Term of Years, before her Marriage with Draper, mortgageth it to one Turner for Security of 100 l. and afterwards, a Day or two before her Marriage with Draper, with his Privity (as appeared by his being a Witness to the Deed) makes an Assignment of her Interest to Trustees, in Trust for her self for Life, and then for her Son by a former Husband; after this she marrieth Draper, and Draper after Marriage payeth off the Mortgage Money, and takes an Assignment from the Mortgagee, and then surrenders his Lease to the Reversioner, and takes a new Lease for the same Term, and dies. Term for Years in Trust for a Feme Covert. Post Case 86. S. P. Vide post Case 174.

The Question was, Whether or no the Husband in this Case had Power to dispose of the Interest of the Wife in this Term for Years, it being settled with the Husband's Privity as aforesaid?

And it was held clearly per Curiam, and admitted by both Parties that, if a Feme Covert, with the Privity of the Husband before Marriage, doth convey a Term for Years in Trust for herself, that is clearly out of the Husband's Power, and he can neither dispose of nor release the Interest of the Wife, and if the Feme should join in the Grant, it would not mend the Case.

But the Court seemed to incline, that if a Feme doth secretly, without the Knowledge of her Husband, before Marriage, convey a Term for Years in Trust for herself, that this shall be in the Power of the Husband, so as he may either grant or release the Interest of the Wife.

And here, though the Estate in Law were wholly in the Mortgagee, and the Feme conveyed nothing but an Equity in Trust; yet when the Mortgagee assigns over to the Husband, the Husband hath it under the same Equity as the Mortgagee had, and is just in his Place, and no Act of the Husband can bar the Trustees for the Feme and her Children of their Equity.

And it was decreed that this new Leaſe ſhould be aſſigned over to the Feme or her Truſtees, paying to the Executor of the Husband the Mortgage Money.

Tregunell's Caſe.

(33.)

Original loſt, ſupplied upon Proof. Poſt Caſe 42.

A Recovery was ſuffered in Ireland in the Time of Oliver Cromwell, and the Original was loſt, but Proof was made that there was an Original.

The Queſtion was, Whether the Court might cauſe an Original to be put upon the File, and ſo ſupply the Loſs of it?

The Judges ſent out of Ireland hither to ſearch for Precedents, for which they were much blamed by the Chancellor; for that by the Law an Original might be ſupplied, Proof being made of it, though the Recovery were ſuffered in the Time of another King, and ſo he ſaid it had been frequently done; that Originals in King James's Time had been ſupplied in King Charles's Time, &c.

Porter *verſus* Hobbard.

2. Cha. Rep. 85. 3. Cha. Rep. 70. 1 Ch. Rep. 80. 2 Ch. Rep. 150. 2 Rol. Abr. 329. Brooke Com. 97. Eq. Cas. Abr. ch. 21. pl. 28. 29. 30.

(34.)

Intereſt upon Intereſt. Poſt Caſe 180, 181.

A Mortgagee, after Money is incurred for Intereſt, aſſigns over to one that payeth him his Principal and Intereſt: The Queſtion was, Whether or no this Aſſignee, upon the Redemption, ſhould have Intereſt for the Intereſt? And,

This Difference was taken, that when a Mortgagee aſſigns, with the Conſent of the Mortgagor, to one that payeth him the Principal and Intereſt, there the Intereſt and Principal are conſolidated by the Conſent of the Mortgagor, and there, upon Redemption, the Aſſignee ſhall have Intereſt for the whole Sum that he diſburſeth; and ſo it is (come ſemble) if the Mortgagor and Mortgagee ſtate their Account and come to an Agreement to continue the Money longer.

But if a Mortgagee aſſign over without the Conſent of the Mortgagor, there no Intereſt ſhall be allowed to the Aſſignee for what he payeth for Intereſt; for if that ſhould be allowed, the Scriveners in London would make a Trade of Aſſigning every ſix Months, and ſo turn their Intereſt into Principal, and by that Means receive Intereſt upon Intereſt.

And this Case being cited to the Master of the Rolls, he would not allow Interest to the Assignee for Interest that he paid to the Mortgagee, it not being done by the Consent of the Mortgagor.

(35.)

THIS Difference was taken per Cancellar', Where a Matter in Fact was particularly in Issue before the former Hearing, though you have new Proof of that Matter, upon that you shall never have a Bill of Review.

But where a new Fact is alledged, that was not at the former Hearing, there it may be a Ground for a Bill of Review.

Bill of Review. Post Case 219.

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(36.) Woodman *verſus* Morrel & ux'.

Juſtice Atkins.

Truſt reſulting. Poſt Caſe 151.

THE Plaintiff in the Year 1660 did lend 300 l. and for Security thereof he took a Mortgage of a Copyhold by way of Surrender in the Name of his Daughter (who was the Wife of the Defendant); in the Year 61 he gave 100 l. more, and purchaſed the ſaid Copyhold Eſtate abſolutely, and took an abſolute Surrender thereof in the Name of his ſaid Daughter (but reſerved an Eſtate thereout to his Wife for Life); in the Year 66 the Plaintiff being in Priſon, the Defendant married the ſaid Daughter of the Plaintiff. The Plaintiff now preferred his Bill againſt the Defendants, to have the Execution of the ſaid Eſtate to him, alledging that his Daughter's Name was uſed only in Truſt for him.

The Defendants pretended that this was deſigned for a Proviſion for the ſaid Daughter, and he did often ſay, when Taxes, &c. were demanded of him, that they muſt go to his Daughter, for the Eſtate was hers.

But it appeared that the Plaintiff had the Poſſeſſion of the ſaid Eſtate ever ſince, and was now in Poſſeſſion.

Judge Atkins was of Opinion upon the whole Matter, that this was a Truſt for the Father who was the Plaintiff, he having paid the whole Conſideration, and having en-

enjoyed it ever since, notwithstanding his Daughter had been now married these eleven or twelve Years: And a Case was cited betwixt Legay and Legay, where the Father put in a Stock of 1000 l. in Copartnership in his Son's Name for Merchandizing; and his Son went beyond Sea, and did act there in relation to the Trade, which was alledged as a great Consideration why it should be to the Benefit of the Son, he leaving his Country thereupon; and yet when he came over the Father preferring his Bill against him, it was decreed a Trust for the Father.

And so the Case of the Lord Grey purchasing Lands in his Son's Name was cited, where it was decreed a Trust for the Father.

And Judge Atkins cited an old Case in Fitzh. Tit. Subpœna, where the Father being far amiss, and like to die, settled his Land upon one of his Children, but afterwards recovering had a Mind to his Land again, and coming into Chancery, it was decreed that he should have it again; and that that Settlement, being made in Prospect of his Death, should not bind him after his Recovery, but should be a Trust for him. And he said that this was one of the first Cases that appears to us of the Chancery taking Jurisdiction of these Matters.

And in this Case, these Differences were taken.

1. Where a Man purchaseth Land in the Name of a Stranger, and of a Child; for in the first Case it is presumed a Trust for the Purchaser; but in the latter, the Presumption is, that it is a Provision for the Child, if there be no Declaration of the Father to the Contrary.

2. In the Case of a Child, there is a great deal of Difference where the Father who is the Purchaser is Dead, and hath made no Declaration; for there it shall be presumed a Provision for the Child; but in this Case the Father is living, and by his Bill declares it a Trust for himself, which takes away the Presumption, and this differs it from all the Cases that have been put of a presumptive Provision, because those Cases were where the Contest was betwixt the Heir and the Child in whose Name the Purchase was made; but this is betwixt the Father himself who made the Purchase, and the Child in whose Name it was taken; and so there is a manifest Diversity. Ante Case 6. Post Case 151, 216.

But it was agreed that, if it could be proved that the Father did at the Time of the Purchaſe really intend it a Proviſion for the Child, no Declaration of his afterwards could alter the Caſe.

But however it was agreed upon all hands, that Circumſtances muſt govern Caſes of this Nature; in this Caſe the Defendants were decreed to ſurrender to the Plaintiff.

(37.) Chamberlaine *verſus* Chamberlaine of Mangersbury.

Lord Chancellor.

Legacy. Cas 13 Chan. Rep. 256. S. C. but not same point.

COL. Chamberlaine the Father of the Parties, having made his Will, and the Defendant who was his Son and Heir, his Executor, ſettled his Lands upon him for Life, with Remainder to his firſt Son, &c. with Remainders to younger Brothers of the Defendant, and left likewiſe 2500 l. due upon a Mortgage upon Wick, from Mr. Stratford, which he deviſed to Truſtees, to be laid out in Land, to be ſettled as aforeſaid, and did likewiſe deviſe 2000 l. amongſt his Daughters (the Plaintiffs); and having ſome Diſcourſe about altering his Will, for fear there ſhould not be Aſſets to pay the Legacies, the Defendant, in Conſideration he would not alter his Will, did Promiſe him to pay the ſaid Legacies.

The Defendant pretended that all the Benefit he had by the Will was not ſufficient to ſatisfy the Legacies, and therefore deſired that, the Aſſets not amounting to 1000 l. what was Defective might be drawed out of the 2500 l. in as much as he was but Tenant for Life of his Lands by the Will.

But it was decreed, that let the Aſſets be what they would, or however the Eſtate was ſettled; yet the Defendant having ſolemnly undertaken the Payment of his ſaid Legacies, in caſe his Father would not alter his Will, and his Father dying in Peace upon the ſaid Promiſe, that the Defendant ſhould pay the Plaintiffs their Legacies; and though the Defendant was but Tenant for Life by the Will, with Remainders prout ſupra, yet if he hath Iſſue, the Fee of thoſe Eſtates may for ever continue in him and his Poſterity, for his Iſſue will be Tenant in Tail, &c. and the Plaintiffs ſhould not be concerned whether or no any Part of the 2500 l. ſhould be drawed

out towards the Payment; and that Point was not determined now, but was left to be decided in a Bill depending betwixt the Defendant and his younger Brothers, on whom the Lands to be purchased with the said 2500 l. were to be settled in Remainder, in case the Defendant died without Issue. *See acc. post*

And the Lord Chancellor said it was the constant Course of this Court to make such Decrees, upon Promisses made, that the Testator would not alter his Will. *See Bee. in Cha. 3. Pl. Vern. 296. 2. if.*

The Earl of Feversham *versus* Watson. (38.)

THE Plaintiff married one of Sir George Sands's Daughters, and upon the Marriage it was agreed by Articles, that the Plaintiff should settle 500 l. per Ann. for separate Maintainance, and should do several other Things; and likewise should purchase 800 l. per Ann. within twenty Miles of London, and settle it upon himself for Life, Remainder to his intended Wife for Life, with Remainders over. Lord Chancellor, Chief Justice North, Chief Baron Montague. Portion conditional to settle Lands. Post Case 64.

And Sir George Sands did article, so soon as the Plaintiff should perform the Premisses, that he would settle 3000 l. per Ann. upon the Plaintiff for Life, Remainder to his Wife for Life, and so to the first and Tenth Son.

The Plaintiff did perform all that was to be done of his Part, except the Purchasing of the 800 l. per Ann. and before that was done his Wife died without Issue.

The Plaintiff preferred his Bill against the Defendant, who married the other Daughter and Heir of Sir George Sands, to have the Estate of 3000 l. per Ann. executed to him for Life according to the Articles, having performed all of his Part but the settling of the 800 l. per Ann. and in that he was prevented by the Death of his Wife; and it was likewise proved, that Sir George Sands did say in his Life-time, that it should be no Prejudice to the Plaintiff, although he had not yet purchased the 800 l. per Ann. but should take his own Time for doing of it, and a great many Expressions of this Kind from Sir George were proved, and were insisted upon by the Plaintiff's Counsel to be in the Nature of Dispensations with the Performance of that Part of the Agreement.

But

But the Court ſeriatim delivered their Opinions againſt the Plaintiff, for that what was to be done by the Plaintiff, was in the Nature of a Condition precedent, and ought to have been done wholly, before the Defendant was obliged to do what was to be done on his Part; and as here the Plaintiff could not bring his Action of Covenant at Law, without Averment of Performance of the Condition Precedent; ſo neither ſhall he in Equity have an Execution of the Eſtate, without doing that which by the Agreement of the Parties ought firſt to be done, and the Plaintiff ought at his Peril to have performed what he was to do in the Life-time of his Wife.

And this Caſe is the more ſtrong, becauſe all the Acts that the Plaintiff hath done are no Prejudice to him; for although he intailed his Eſtate upon the Iſſue of his Wife, yet ſhe being now Dead without Iſſue, he is abſolute Owner of the Eſtate again; but if the Plaintiff had paid a great Sum of Money or ſuch like, though he had not fully performed every Thing, yet it may be he might have been relieved ſo as to have had the Eſtate executed, or a Compenſation for his Money.

And per Cancellar', If the Wife had left Iſſue, the Iſſue might have had Relief here, for there was no Default in the Iſſue that the Condition was not performed; but here it muſt be intended, that if Sir George Sands had been living, he would not have agreed to have had the Eſtate ſo ſettled, his Daughter being Dead without Iſſue. And the Caſe of Cheeke and Lord Liſle was cited to be a ſtronger Caſe than this; for there the Party had four Years Time to make a Settlement, and the Wife died in the four Years Time, and yet the Settlement not being made, the Party could not be Relieved.

And per North, The Chancery will never force the Execution of an Eſtate, but either where the Agreement is in Writing, or elſe where a Valuable Conſideration is paid or performed of one Part, and it muſt not be a trifling Conſideration, as the Payment of twenty Shillings, or ſuch like; for this Court will not compel the Execution of an Eſtate thereupon, where the Agreement is not in Writing.

Tota Curia contra queren'.

(39.)

A Bill being to come to an Account for ſeveral Sums of Money due to the Defendant from the Plaintiff upon ſeveral Securities, amongſt which there were two Judgments, one in Battery, and another for Words, ſuggeſting that moſt of the Debts were paid; It was ordered that they ſhould go to an Account, but directed that no Intereſt ſhould be allowed for the Judgments for Damages in Battery and for Words, notwithſtanding they had been long due.

Lord Chancellor.

Intereſt Money.

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(40.)

Lord Chancellor.

Execution of an Agreement not to vary from the Agreement. Post Case 200. b.

THE Father, upon the Marriage of his Son, articled to settle his Lands to the Use of himself for Life, Remainder to his Son in Tail, &c.

And when the Conveyance was to be made, he would have had it without Impeachment of Waste.

But the Lord Chancellor would not order it, for though it had been reasonable that it should have been agreed so, yet now he must take the Agreement as it was, and he would not alter the Agreement.

Bubb's Case.

(41.)

Lord Chancellor.

Heir.
Executor.

BUBB did contract with A. for a Parcel of Land for 5000 l. and paid him 140 l. in Part, but before the Rest of the Money was paid, or any Conveyance executed, A. dies, and makes B. his Executor, C. being his Heir.

B. prefers his Bill against Bubb, and C. to have the Rest of the Purchase Money; who answered that they did not intend to proceed with the Bargain, and Bubb said he was willing to lose his 140 l. that he had paid.

In this Case it was agreed, that Bubb who was the Purchaser might have preferred his Bill against the Heir, to have had an Execution of a Conveyance pursuant to the Agreement, by reason the Agreement was executed in Part in the Testator's Life-time, by the Payment of 140 l.

see post. 199.

But it was insisted by the Counsel of Bubb, that by Reason he (being the Purchaser) did not desire an Execution

of the Agreement, and being content to loſe what Money he had paid, that the Executor ſhould not compel them to it.

But the Court ruled that the Executor ſhould have the Money, and that Bubb might when he pleaſed compel the Heir to execute a Conveyance of the Eſtate.

Note, That the Court took this to be a Juggle betwixt Bubb and the Heir, ſuppoſing that the Heir had agreed to pay back the Money to Bubb, and ſo to have kept the Land, which was worth much more; for now the Heir was to convey the Land, but to have nothing for it, for the Executor was to have the Money.

Amendment of an Original. (42.)

A Writ of Error being brought to reverſe a Judgment given in a Formedon, for an Error in the Original; it was prayed here that the Original might be amended. Lord Chancellor.

Note, That a Fine was levied of the Lands twenty Years ſince.

And it was ordered that, if the Formedon were brought within five Years after the Fine, it ſhould be amended, otherwiſe not.

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(43.)

Charitable Uſes.

AN Annuity was deviſed to Charitable Uſes intentionally, but the Uſes expreſſed were void; and thereupon the Lord Chancellor did decree it to be paid to ſuch Perſon as ſhould be approved of by the Biſhop of London, for Expounding and Catechiſing every Saturday; and he cited a Caſe in Lane's Reports, where a Penſion was given to ſilenced Miniſters, and decreed by the Barons of the Exchequer to poor conforming Miniſters.

And in this Caſe, by Reaſon there were great Arrears, he ordered that they ſhould go to increaſe the Stipend, and the Perſons that proſecuted this Suit to be paid their Charges out of the Arrears.

(44.)

Dingly *verſus* Dingly.

Limitation of a Perſonal Thing in Remainder. Vide poſt Caſe 357.

A. The Teſtator having 1000l. due upon a Mortgage, deviſed the Profits of it to the Defendant for her Livelihood and Maintenance, and after her Death, without Iſſue, to the Plaintiff, and made the Defendant Executrix, and died.

Security to pay Legacies.

The Plaintiff preferred his Bill in this Court, to compel the Defendant to give him Security, that the Money ſhould be preſerved to him, in caſe ſhe ſhould die without Iſſue.

And in this Case it was made a Question, Whether this Devise of the Money, after the Defendant's Death without Issue, were good or not; and it was argued by Mr. Attorney, that it is not; for if this should be permitted, here would be an Intail of a Personal Chattel, that could by no Means be barrable; for this is as much as if he had devised it to the Defendant and her Issue; and so it is in Case of Lands; but in this Case the Issue could not have it, because it cannot descend, but the Executors of the Defendant. The major Opinion at the Bar seemed to be, that the Limitation over to the Plaintiff was void; but the Lord Chancellor gave no Opinion, for he said although this Court doth sometimes compel Executors to give Security for Legacies, yet that must be when they are clear and without Disputes, and not when the Right is dispuatable, as in this Case, or at least depends upon a Contingency; and so the Plaintiff's Bill was dismissed; and by Mr. Attorney, a Mortgage cannot be intailed, being for Security of a Personal Duty, and to go to the Executor. Vide ante Case 11.

Hicks *versus* Pendarvis. (45.)

FIVE hundred Pounds were devised to the Plaintiff's Wife, if she married with the Consent of certain Trustees, and in case she did not, then 20 l. per Ann. for her Life; she married the Plaintiff without the Consent of the Trustees, and he preferred his Bill here for the 500 l. and it was urged on the Behalf of the Defendant, that this did differ from the common Case of a Devise upon a Condition in Terrorem; for it hath always been held that where there is a Devise over to a third Person for Non-performance of the Condition, there if the Party marry without Consent, &c. all shall go to the third Person, because he hath a conditional Interest by the Will, and if there be no Devise over, then it is esteemed only in Terrorem, and the Party shall have the Legacy notwithstanding the Breach of the Condition; but here this is tantamount or as strong as a Devise over, when the Party himself saith, that if she marrieth without Consent, she shall have but 20 l. per Ann.

Condition in Terrorem.

Ante Case 17.

But to that it was answered by the Lord Chancellor, that this differed not from the Reason of the common Case of a Devise in Terrorem, and the Reason he said he had

from my Lord Chief Justice Hale, who (when it was objected in another Case in this Court, that this Court will not make Mens Wills for them, and give their Estates quite contrary to their Intents) answered, that this Court holds Plea of Legacies, and judges of them by the Rules of the Civil Law, and by that Law any Condition added to restrain Marriage is void; so that where an Interest doth not accrue to a third Person by the Breach of the Condition, such a Condition is void and only in Terrorem, and so the 500l. was decreed to the Plaintiff.

Vide post Case 135.

But if it had appeared that any Surprise or Bribes, &c. had been used in obtaining a young Maid to marry unsuitably, perhaps this Court would order it otherwise.

(46.) Hyde *versus* Seymour.

Vide 1 Ch. Rep. 68. Lord Nottingham's Chirog. N° 823.

Infant in Ventre sa mere.

LANDS were devised to Trustees, for the raising of Portions for the Devisor's Children; the Devisor had only two Children at the Time of his Death, and his Wife was big with another and within ten Weeks of her Time; and the Question was, Whether this Infant in Ventre sa mere should have a Share.

It was urged by the Attorney General, that he shall not, this being a Devise of Lands which are devisable only by the Statute, which saith that a Devise may be made to any Person or Persons; and the better Opinion, since the Statute, hath been, that Lands devisable by the Statute only, could not be devised to an Infant in Ventre sa mere, because he is not properly a Person; but otherwise it is of Lands devisable by Custom; and so Goods or Chattels may be devised to an Infant in Ventre se mere; but there is great Difference between a Devise of Goods and Lands; for if a Man devise all his Goods, those that he buyeth after shall pass; but otherwise it is of Lands without a new Publication.

And farther in this Case here is no express Devise to the Infant, for the Word Children is well satisfied in the two Children that were born before.

1 Roll. 609. Post Case 294.

But the Lord Chancellor was of Opinion, that the Infant in Ventre should have a Share; for it is incumbent upon the Parent to provide for that as well as any of the Rest of the Children, and he shall never be made worse than an Infidel by Construction; and he took a great Difference

where the Feme was groſſement enſeint, and the Child in Proſpect of the Father, as in this Caſe, and where he was priviment enſeint; and he ſaid there was a ſtronger Caſe than this in Fitzh. Tit. Subpœna, where a Man by his Will ordered his Feoffees to convey to his Daughter; after his Death a Son was born; and this Court ordered them to convey to the Son; and ſo it was ſaid is the Practice of the Eccleſiaſtical Court at this Day; where a Daughter is made Executrix, and after a Son is born, they will grant Adminiſtration to the Son, for the Preſumption that, if he had been born, the Teſtator would have made him Executor.

And in this Caſe the Lands are not deviſed to the Children, but to the Truſtees, to raiſe Portions for them. Vide Wild's Caſe, 6 Co. 16.

ſee Fitzh. tit. ſubpœna pl. 23. being a caſe of 21. Ken. 6.

Millard's Caſe.

(47.)

A Bill was preferred for Diſcovery of Title and Writings. The Defendant pleads that he was a Purchaſer for a Valuable Conſideration, without Notice of the Plaintiff's Claim, and ſo demurs.

Diſcovery of Writings. Ante Caſe 25. Poſt Caſe 155.

The Plea was ruled to be ill per Cancellar', becauſe he doth not ſet forth the particular Conſideration; but if that had been expreſſed it had been good; and ſo it was held in one Snag's Caſe.

Noel *verſus* Jevon.

(48.)

THE Bill was to be relieved againſt the Defendant's Dower, her Husband being only a Truſtee; and it appearing that the Husband was but a Truſtee, the Defendant was barred of her Dower, contrary to the Opinion of Naſh verſus Preſton, 1 Cro. 191. and ſo it was ſaid is the conſtant Practice of the Court now.

Poſt Caſe 83.

DE

DE
Term. S. Trin.
1679.
In Curia Cancellariæ.

(49.) Purefoy *verſus* Jones.

Lord Chancellor Finch.

Agreement to deliver up Securities to be Executed.

MR. Knightly Purefoy (the Plaintiff) was bound with his Brother George to the Defendant in a Bond of 4000 l. for the Payment of 2000 l. and there was alſo a Mortgage made by George to the Defendant, for Security of the ſame Money; afterwards George having Occaſion to take up more Money, agreed with the Defendant to give him a Statute for his Security, and the Defendant to deliver up the Mortgage, and (as the Plaintiff pretended) the Bond too; the Mortgage was delivered up, but not the Bond; George dies, and the Defendant ſued Knightly Purefoy upon the Bond, who preferred his Bill in this Court, to have the Bond delivered up according to the ſaid Agreement.

Some Proof was offered to the Agreement to deliver up this Bond upon the giving of the Statute; but the Lord Chancellor ſaid, if the Agreement were ever ſo well proved, yet the Plaintiff ſhould have no Relief here; for here the Defendant was Shipwrack'd, and had this Plank to ſave him, and he would not take this from under him to let him ſink, to make him loſe his Debt; and if he could have any Remedy at Law he might take it, but he ſhould never be defeated of it in Equity by the Decree of this Court.

William Bourne *verſus* Bull, Muſgrave, Executors in Truſt, and Helena Bourne. (50.)

Intereſt Money.

J. Bourne (who was the Father to the Plaintiff and the Defendant Helena) gave to his Daughter Helena 1000 l. and if ſhe married with the Conſent of the Truſtees, then he gave her 2000 l. more, to be paid her at the Day of Marriage or 21 Years of Age, and in the mean Time the Mother to have 80 l. out of the Intereſt of the ſaid 3000 l. for Maintaining and Educating her, and the Reſidue of his Perſonal Eſtate, after his Debts and Legacies paid, he deviſed to the two Executors in Truſt to be laid out inpurchaſing Lands to be ſettled and intailed upon the Plaintiff.

The only Queſtion was, Who ſhould have the Surplus of the Intereſt over and above the 80 l. of the 3000 l. until the Marriage or full Age of Helena, whether it ſhould accrue to the Benefit of the Son, to be laid out in Land, or whether it ſhould go to the Daughter?

Poſt Caſe 65, 255.

It was agreed, that where a Legacy is left to a Child, to be paid at a certain Age, and no Proviſion is made for the Maintenance of the ſaid Child in the mean Time; that this Court doth often decree the Intereſt of it for the Maintenance of the Child.

But here it was objected, that the Teſtator himſelf had been his own Chancellor, in as much as he had appointed 80 l. per Ann. to be paid for the Maintenance of the Defendant Helena.

But my Lord Chancellor was of Opinion clearly, that the Daughter ſhould have the Benefit of the Intereſt, for this 3000 l. was ſeparated from the Reſt of the Perſonal Eſtate, which 3000 l. was not to be laid out in Lands, nor any Part of it, unleſs the Child did break the Condition precedent, which was to marry without the Conſent of the Truſtees.

And it was held, that the Reſidue over and above the 3000l. might be laid out in a Purchaſe preſently, without tarrying to ſee the Event concerning the 2000 l.

Note, That here it is not ſaid that the Daughter ſhould have 80 l. per Ann. but ſo much ſhould be paid to the Wife for her Maintenance, which doth not imply that he intended no more for the Benefit of his Daughter.

Legacies.

Note, That it hath been held formerly in this Court (per Sir John Churchill) that if Legacies were given to Children and Strangers, and there was a Defect of Aſſets, that the Children ſhould not abate in Proportion, but the Loſs ſhould fall upon the Strangers.

DE
Term. S. Mich.
1679.
In Curia Cancellariæ.

(51.)

No Order till it is drawn up and signed.

THE Plaintiff obtained an Injunction in this Court. The Defendant moves to diſſolve it, and obtained an Order to diſſolve it; before the Order was drawn up the Defendant arreſts the Plaintiff. And it was held clearly, that this was a Contempt to the Court, and the Defendant was ordered to be committed; for it is no Order till it is drawn up and paſſed by the Regiſter, for the Regiſter's Minutes are only a Warrant for an Order, and no Order.

Bloys *verſus* Bloys.

(52.)

l. c. Nottingh. MSS. case n°. 979.
2. Vent. 347. 2. Chan. Rep. 162.

A Deviſe to one that hath a Proviſion before.

SIR Thomas Bloys having Iſſue a Son and two Daughters by a firſt Venter, upon his Marriage with a ſecond Wife, makes a Proviſion by Settlement of 3000 l. for his Daughters by the ſecond Venter; afterwards, having Iſſue one Daughter by his ſecond Wife, by his Will deviſes all his Eſtate, Real and Perſonal to his three Daughters, provided that if the Son would pay 9000 l. to his Siſters, that then that Deviſe ſhould be void, and dies.

Firſt it was held, that the whole Charge upon the Eſtate of the Teſtator, Real and Perſonal, was but 9000 l. of which the 3000 l. ſettled upon the Daughter of the ſecond Venter, was to be Part.

But the Queſtion was, Whether ſhe ſhould have her Share in the Remainder of the 9000 l. beſides the 3000 l. for if ſo, then the two Daughters by the firſt Venter would

have

have had but little more then 1500l. apiece, and this Daughter by the second Venter would have had above 4500l. if this Provision by the Will should be taken to be additional to what was settled upon the Marriage.

And the Lord Chancellor held clearly that it should not, there being no Proof that it was the Intent of the Father that it should be additional; and he cited the Case of Pyle and Pyle, where Sir Francis Pyle settled 3000l. apiece by Deed upon his three Daughters, and after in his Will gave them 3000l. apiece, without taking any Notice of the Provision he had made by Deed; and there being no Proof of his Intent to make this in his Will additional to the other by Deed, it was held it shall be intended the same 3000l. and so they had each of them but 3000l. in the Whole.

And if that Exposition were made there, in case of the Daughters and Heirs of the Family, for the Benefit of the collateral Heir Male, then this is a much stronger Case where it is betwixt the Daughter of the second Venter and the Daughters of the first.

DE

DE
Term. S. Hill.
1679.
In Curia Cancellariæ.

Clarke *verſus* Perrier, Executor of Captain Perrier, a Scrivener.

(53.)

A Scrivener letteth out Money upon bad Security.

THE Plaintiff depoſited 300 l. in the Hands of Captain Perrier the Defendant's Teſtator, who let the ſame at Intereſt upon a Mortgage of Houſes in London, and took the Mortgage in the Plaintiff's Name, which Mortgage after proved defective, and the Plaintiff received the Intereſt for ſeveral Years, but it did not appear by the Proofs in the Cauſe, that the Plaintiff did ever aſſent to this Mortgage, or that he did give the Defendant a general Authority to diſpoſe of it at Intereſt as he thought fit; neither did it appear on the other Side, that the Plaintiff did lay any Reſtraint upon the Defendant, that he ſhould not diſpoſe of it without his Approbation, ſo that the Caſe reſted merely upon Conſtruction of Law, whether a Scrivener, diſpoſing of Money depoſited generally in his Hands upon bad Security, ſhall be anſwerable for it, there being no Proof of any Fraud or Colluſion in the Scrivener, or whether the Owner of the Money ſhould ſtand to the Loſs of it.

1 Inſt. 89.

And my Lord Chancellor ſaid it was like the Caſe of a Bailment at Common Law; if I deliver Goods to another to keep, and he loſe them by any Accident, the Loſs ſhall

fall upon him, unleſs he qualifieth the Conſtruction of Law by ſaying that he will keep them as his own, and then the Loſs, if it be involuntary, falleth upon me.

The Lord Chancellor ſaid it was a Caſe of great Conſequence, and ſo he would conſider of it before he would deliver any Opinion.

Afterwards it appearing by the Proofs, that the Plaintiff had by his Agents received Intereſt for ſeveral Years, and in the Receipts had taken Notice of the Principal being in Mortgage upon the ſaid Security, this did amount to an Approbation of the Security, and ſo the Lord Chancellor was of Opinion that he ought to ſuſtain the Loſs, and reverſed the Decree made by the Maſter of the Rolls econtra.

But if it had ſtood barely upon the Conſtruction of the Law, without any Proof of the Conſent or Approbation of the Party, there the Scrivener muſt have ſuſtained the Loſs according to the Rules of Law in caſe of Bailment; as 1 Inſt. 89. and he cited Exod. Chap. 22. that the Levitical Law was ſo.

Foly's Caſe. (54)

Debts and Legacies. Aſſets.

THE Executors of Foly preferred a Bill againſt all the Creditors, ſome being by Judgment, ſome by Bond, and ſome by Simple Contract; the Teſtator having deviſed Lands to the Executors for the Payment of his Debts; and he had in the firſt Place in his Will deviſed an Annuity of 50l. per Ann. to be paid to his Wife.

My Lord Chancellor directed, Firſt, That the Lands being deviſed to his Executors, it ſhall be conſtrued that the Teſtator intended that they ſhould be paid in the ſame Order as the Law directs, that is to ſay, that the Debts ſhould be firſt paid before this Annuity, which was but a Legacy, let the Wording of the Will be how it will; although it deviſed the Lands charged with this Annuity for the Payment of Debts, yet the Debts ſhould have the Preference; but he held that the Debts of all Kinds, whether by Judgments, Bonds, or Simple Contract, ſhould be ſatisfied pari paſſu, and if the Value of the Land fell ſhort, then that they ſhould be ſatisfied in Proportion, only Judgments that did affect the Land without any ſuch Deviſe were to have the Preferrence; but a Debt by a Decree in Chancery ſhould be but in equal Degree with Debts by Bond or Contract, becauſe that doth not bind the Land until Sequeſtration.

But ſo far as the Perſonal Eſtate did extend, he ordered that the Debts ſhould be paid in that Order as the

Law did direct, and there a Debt by a Decree in Chancery should have the Preference of a Bond.

And the Case of Hickson and Witham was cited.

(55.) Sir Oliver Butler's Case.

Lord Chancellor, Chief Justice North, Justice Jones.

A Scire Facias issued out in the King's Name to repeal a Patent granted for a Market to be held at Chatham, upon a Suggestion that it was ad grave damnum of the City of Rochester.

Sci' Fa' to repeal a Patent.

It appeared upon the Pleadings, that an ad quod damnum issued out, but was executed surreptitiously twenty Miles from the Place, and nullum damnum returned, and thereupon the King made this Grant.

The Defendant demurred to the Scire Facias.

One Question made was, Whether upon a Scire Facias it might be averred this Grant was ad grave damnum, when it was found by the Inquisition that it was not ad damnum; and so it was averred that another Inquisition should have been found in Contradiction of it before the Party should be admitted to this Averment.

But to that it was answered, That the Inquisition found upon the ad quod damnum was not obligatory, but that any Person might aver the Contrary without a Matter of Record; and for that they cited Sir William Juxon's Case, where it was held that any Person might bring his Action on the Case, and was not estopped by that Inquisition; and so Judge Jones said it was held in another Case lately in the King's Bench.

And North said the Difference was this, that where another Office was found the King might seise immediately, otherwise he must bring a Scire Facias, and then the Matter of Damage may be put in Issue and tried.

Dy. 211.

And my Lord Chancellor and the Judges concurred that this Patent ought to be repealed, for as much as it was alledged in the Scire Facias to be ad grave damnum, and the Defendant had confessed it by his Demurrer.

And my Lord Chancellor said that it would be inconvenient, if such a Patent might not be repealed by a Scire Facias, for then the Party must be put to his Action toties quoties, which would be vexatious and endless, and here it may be tried once for all; for if the Damage had been traversed, it should have been sent into the King's Bench to be tried, and the Patent should have stood or fallen according to the Event of that Trial.

DE
Term. Paſchæ
1680.
In Curia Cancellariæ.

Povye's Caſe. (56.)

A. Was indebted 1500 l. whereof 500 l. was ſecured by Mortgage, the Reſidue by Bond; A. before his Death makes a Leaſe of all his Lands to Truſtees for Payment of his Debts, which Leaſe in the whole was worth about 1200 l. the Heir of A. after his Death ſells as much Land as payeth 1400 l. whereof the Mortgage for 500 l. was Part (which was more than the Value of the Truſt Eſtate). Povye who was a Creditor for the other 100 l. brought his Bill againſt the Heir and the Truſtees, to have his Debt ſatisfied out of this Truſt Eſtate.

Lord Chancellor.

Truſt for Payment of Debts.

It was inſiſted for the Heir, that having paid as far as the Value of the Truſt Eſtate did extend, he ought not to have his Lands charged any farther.

But it was ruled, that being the Truſt Lands were not ſufficient to ſatisfy the whole Debt, the Heir and the Truſtees and the Mortgagee ſhould not juggle together to cheat other Creditors, by paying the Mortgage firſt off; but on the contrary the Truſt Lands ſhould be applied in the firſt place for the other Debts, becauſe the Mortgagee could be at no Damage, being ſecured by his Mortgage; but on the contrary, if the Mortgage ſhould be firſt ſatisfied, the other Creditors might loſe their Debts;

Debts; and ſo the Plaintiff in this Caſe had Relief for his Debt.

(57.)

Heir and Executor of Mortgagee. Ante Caſe 11, 17. Poſt Caſe 143, 245.

A Bill was brought againſt the Heir of the Mortgagee to redeem, and neither the Executor nor Adminiſtrator were made Parties; and this Exception being taken at the Hearing of the Cauſe, the Lord Chancellor would not proceed to the Hearing of the Cauſe; for if it ſhould fall out upon the Account, that Money ſhould be paid by the Mortgagor, that is to be paid to the Executor or Adminiſtrator, and not to the Heir; and ſo the Account ought not to be controverted without their Privity.

(58.)

Lord Chancellor. Obligor Executor.

OBligee makes the Obligor Executor in Truſt for his Children, &c. though this be in Law an Extinguiſhment of the Debt; yet in Equity it is not, but it ſhall be preſerved in Being for the Benefit of the Ceſtuy que Truſt.

(59.) Leſley's Caſe, at the Rolls.

Truſtee for an Infant purchaſeth.

A Man is Guardian or Truſtee for an Infant to whom Lands are deſcended or deviſed, but the Title is revera in a third Perſon, if the Truſtee or Guardian buy in the Title of this third Perſon, this ſhall not be taken to be a Truſt for the Infant, for he is at Liberty to purchaſe it as well as any Body elſe; and ſo it was held in the Caſe of Combes and Throckmorton, per Cancellar'.

(60.) Chamberlaine *verſus* Chamberlaine.

Lord Chancellor. Will. Averment of the Intent of the Teſtator. Ante Caſe 37. Poſt Caſe 179.

THE Father of the Plaintiff and Defendant did deviſe his Eſtate to his eldeſt Son Edmund, with a Remainder to his firſt, ſecond and third Son, and for Default of ſuch Iſſue, to his ſecond Son Humphry, with Remainders to his firſt, ſecond and third Son; and ſo to his third Son, &c. Provided that if his eldeſt Son Edmund, when he enjoyed the Eſtate, ſhould have no Iſſue Male living, that then he ſhould pay 40 l. per Ann. for the Maintenance of the eldeſt Son of Humphry, and for his

Education, in such manner as was fit for his Degree, until his eldest Son should have a Son produced and living.

Edmund the eldest Son had Issue a Son, who lived three Days, and then died. It was in Proof that Edmund the Testator did declare that his Intent was, that this 40 l. per Ann. should be paid in case Edmund should have a Son born that should die suddenly after.

Per Cur': The Annuity is determined, and a collateral Proof shall not be admitted against the express Words of the Will; and it is probable his Intent was, that the 40 l. should be continued to be paid, although Edmund had a Son which died suddenly after; yet now it must be taken upon the Words of the Will, and an Averment of the Intent of the Party contrary to his express Words shall not be received; and so decreed against the Plaintiff. If it had been a Trust, the Intent might have been supplied by Proof; per Cancellar'.

Abraham *versus* Bubb.

(61.)

ONE Abraham (to whom the Plaintiff is Heir) upon his Marriage did settle the Lands, upon which the Waste in Question was intended to be committed, to the Use of himself and his Wife, and the Heirs of their two Bodies; afterwards the Husband dieth without Issue; his Wife marrieth the Defendant, being then Tenant in Tail after Possibility of Issue extinct; and she and her second Husband having felled some Trees in a Grove that grew near, and was an Ornament to the Mansion-House, and having an Intent to fell the rest, the Plaintiff, to whom the Lands did belong in Remainder, preferred his Bill to restrain her from felling those Trees, and to have an Injunction to stay the Committing of Waste.

Lord Chancellor.

Injunction to stay Waste. Vide post Case 349.

It was insisted upon by the Defendants, that Tenant in Tail after Possibility of Issue extinct, is by the Law dispunishable of Waste, as appears 11 Co. in Lewis Bowles's Case, and 1 Inst. 27. b. Lit. sect. 352 and in the Case of Lewis Bowles it is held, that if a Lease be made absque impetitione vasti, the Tenant is not only dispunishable of Waste, but the Property of the Trees is in him if he fell them; and in the Case of Wentworth versus Wentworth it was held by all the Judges of England, that Tenant in Tail after Possibility of Issue extinct is dispunishable of Waste, and so is Lewis Bowles's Case, 11 Co. 80.

Per Curiam: The Law formerly was held to be, that if there were Tenant for Life, without Impeachment of Waſte, that this did only create an Impunity to the Tenant for Life, although it was the expreſs Proviſion of the Party. 4 Co. 63. But afterwards in Lewis Bowles's Caſe, 11 Co. 80. the Opinion was, That theſe Words did veſt a Right and Intereſt in the Tenant for Life, and did give him Liberty to fell and take the Trees to his own Uſe; for there is an expreſs Proviſion of the Party; but in the Caſe of Tenant in Tail after Poſſibility of Iſſue extinct, that is the Proviſion of the Law only; and though in ſome Caſes fortior eſt diſpoſitio legis quam Hominis, yet that ſhall not be to incumber Eſtates.

But in many Caſes, where a Perſon is diſpuniſhable in Law for committing of Waſte, yet this Court ſhall injoin him; as where there is Tenant for Life, Remainder for Life, Remainder in Fee, the Tenant for Life ſhall be reſtrained from committing of Waſte by the Injunction of this Court; though if he do commit Waſte no Action of Waſte will lie againſt him, (ſed ſemble, that an Action of Trover will lie for the Reverſioner, becauſe the Property of the Trees is in him); and though this Action of Trover be a new Remedy, yet it is a juſt Remedy; and tho' this was a Remedy not known heretofore yet it is juſt; and it muſt be admitted that the Law is better underſtood now than formerly it was, and the Law by Experience and Practice is improved, and learned Men by Study ſee farther and farther into the Depth of it; per Cancellar'.

1 Cro. 242: Allen 84. And he ſaid that in my Lord Chief Juſtice Rolle's Time, in the Caſe of Eudall verſus Eudall, Rolle was of Opinion, that an Action of Trover would lie for the Reverſioner againſt Tenant in Tail after Poſſibility of Iſſue extinct, for Trees cut down by him; and my Lord Chancellor declared he was of that Opinion, though he could not be puniſhed by an Action of Waſte, becauſe he had only an Impunity if he committed Waſte, but no Intereſt in the Trees; but Pemberton argued fortiter econtra.

And my Lord Chancellor ſaid, If there be Tenant for Life without Impeachment of Waſte, if he goeth to pull down Houſes, &c. to do Waſte maliciouſly, this Court will reſtrain, although he hath expreſs Power by the Act of the Party to commit Waſte; for this Court will moderate the Exerciſe of that Power, and will reſtrain extravagant humorous Waſte, becauſe it is pro bono publico to reſtrain it; and he ſaid he never knew an Injunction denied to ſtay

the pulling down of Houſes by Tenant for Life without Impeachment of Waſte, unleſs it were to Serjeant Peck in my Lord Oxford's Caſe, and he ſaid he did believe he ſhould never ſee this Court deny it again; and he cited the Biſhop of Wincheſter's Caſe, who made a Leaſe for 21 Years, without Impeachment of Waſte, of Lands that had many Trees upon it; the Tenant cuts down none of the Trees till about half a Year before the Expiration of his Term, and then goeth to felling down the Trees, and in that Caſe he was injoined by this Court; for though he might have felled Trees every Year from the Beginning of his Term, and then they would have been growing up again gradually; yet it is unreaſonable that he ſhould let them grow till towards the End of his Term, and then ſweep them all away; for though he had a Power to commit Waſte, yet this Court will model the Exerciſe of that Power. This Caſe he ſaid was in Print, reported by J. Jones, but upon Search I cannot find it. *ſ. Ro. Abr. 380. 1. pl. 3. l. c.*

And he cited the Lady Evelin's Caſe, where there was Tenant for Life, Remainder to the firſt Son for Life, without Impeachment of Waſte, with Remainders over; the firſt Son, by the Leave of the Leſſee of Tenant for Life, comes upon the Land and fells the Trees, although he could not in that Caſe be puniſhed by an Action of Waſte, yet he was injoined by this Court.

In the End this Caſe was referred, and if they could not agree, then to be ſet down again; but my Lord Chancellor diſcovered his Inclination fortiter for granting an Injunction.

Sam. Aſtrey's Caſe. (62.)

Statute of Limitation.

IN this Caſe it was held unanimouſly, that where there was an Account current for 20 Years, as Receiver of Rents, and much more in paying and receiving mutually, yet this was not barred by the Statute of Limitation; but if the Account were ſtated or ended, and then the Party forbears to proſecute for ſix Years, he is barred by the Statute. And here Aſtrey (who was the Executor of Mrs. Moſſe (his Mother in Law) who was Executrix of her Husband Mr. Moſſe) was decreed to account for the Profits of Lands received by Mr. Moſſe before his Death, in Truſt for the Plaintiff.

Account againſt Executor.

D E

DE
Term. S. Trin.
1680.
In Curia Cancellariæ.

(63.) **Annand & ux' *verſus* Honywood.**

Lord Chancellor

Cuſtom of London.

THE Caſe was, The Plaintiff's Father had two Daughters, the Eldeſt was married to the Plaintiff, and had a Portion; the Father by Will afterwards, reciting that his ſaid Daughter was not ſufficiently advanced, did make a further Proviſion for her; but after that he revokes that Will and makes another, whereby he declares that his ſaid married Daughter was ſufficiently advanced, &c. and then dies.

The Bill was brought for a cuſtomary Part of the Perſonal Eſtate that the Father died poſſeſſed of at the Time of his Death; and here it was held per Cur', that when a Daughter is married and hath a Portion, that is prima facie intended an Advancement; and this is ſo intended and taken by the Cuſtom of the City; but by the ſame Cuſtom, if the Father doth afterwards, by Will or Writing, declare that ſhe is not advanced ſufficiently by the Marriage, then this by the ſame Cuſtom doth open the Matter again, and let her in to her cuſtomary Part.

Cuſtom of London.

Poſt Caſe 351.

And it was likewiſe held here, that if at the Time of the Marriage it had been agreed, that notwithſtanding her Portion then given, ſhe ſhould have had her cuſtomary Part, let the Cuſtom be what it would,

there would then have been an Equity to let her in for her customary Part, and this Court would have given Remedy.

But here being no such Agreement, the Matter rests purely upon the Custom; and therefore it was ordered that the Custom should be certified by the Recorder, viz. Whether a Declaration that his Daughter was not sufficiently advanced by his Will, which afterwards was revoked, shall be sufficient to let the Daughter into her Share; and whether the Will, notwithstanding the Revocation, shall yet continue a Writing to this Purpose.

But he would not suffer it to be put in Issue, whether the Marriage shall not prima facie be intended an Advancement; for he said that was already certified formerly by Coke when he was Recorder of London, and it is reasonable it should be so, for the Reason that is given by Swinburne; for when the Portion is given, it is proportioned to the Estate which the Party that giveth it then hath; and as when there is a Decay of his Estate, the married Party beareth no Share in the Loss; so if there be an Advance, it is not reasonable (without a Declaration made by the Party) that she should have the Benefit of that Advance.

Graves *versus* White. (64)

THE Defendant married the Plaintiff's Wife's Mother; the Plaintiff being a Suitor to the Defendant's Daughter in Law came to a Treaty with the Defendant; the Defendant being then possessed of the Personal Estate that was left by his Wife's former Husband, a Share whereof was due to the Plaintiff's Wife, the Plaintiff and the Defendant enter into Articles, and in the Articles it was recited, that whereas the Defendant was to pay to the Plaintiff One thousand Pounds for the Marriage Portion of the Wife, the Plaintiff covenanted to settle certain Lands, &c.

Lord Chancellor.

Marriage Agreement executed.

Portion.

Ante Case 38. Post Case 275.

It fell out that the Share of the Personal Estate which the Plaintiff was intitled to, was but Three hundred and twenty Pounds.

Covenant.

But it was decreed that he should pay the 1000 l. and per Cur', an Action of Covenant will lie upon this Recital; whereupon it was insisted that the Plaintiff ought to

Vide ante Case 3.

be dismissed to Law, and bring his Action of Covenant there.

But per Cancellar', where there is a Remedy at Law for one Thing in a Bill which is complicated with other Matters which are proper in Equity, there this Court will determine the whole Matter.

And although it was objected here, that the Wife lived but six Months, and that the Husband was not able to have made the Settlement he agreed upon, and that the Wife had very hard Usage from the Husband the Time she lived with him; yet the Court decreed ut supra.

And my Lord Chancellor cited the Lord Delaware's Case lately decreed here, where an Agreement was to pay the Marriage Portion to such Person as he should appoint in the Space of six Months, and he was in Consideration thereof to settle certain Lands; the Marriage took effect, the Wife died, and the six Months elapsed, and no Person appointed to receive the Money; and yet the Portion was decreed to be paid to the Lord Delaware without examining his Capacity to make a Settlement according to the Agreement.

(65.)

Parker *versus* Parker.

Lord Chancellor.

Legacy when payable.

THE Plaintiff's Father devised to her and her Sisters a Legacy of Four hundred Pounds, to be paid at their Days of Marriage, and if either of them died before Marriage, then her Part to go to the Survivors, and in the mean Time to have Maintenance and Education.

The Plaintiff being now Twenty-six Years old, and not minded to Marry, preferred this Bill for her Portion.

It was argued for the Plaintiff, that the usual Way is to make the Payment at such an Age, or Day of Marriage, which shall first happen; and here though the Day of the Age be omitted, yet it may be intended the Age of Twenty-one, when she is of Ability to manage and dispose of it.

But per Cancellar', this is an easy Case; for wheresoever there is a Devise over, the Testator is his own Chancellor, and there the Limitation must be taken as it is penned; and here would be a manifest Injury to those in Remainder, if this Court should decree the Portion

tion before Marriage, and the Intent of the Testator would be defeated; for it is plainly his Intent, that if she dieth unmarried, her Share should be equally divided amongst the rest of the Children; and if it be decreed to her, she may give all to one, and none to another; and he said it was much the same with my Lady Kilmurrye's Case, where One thousand Pounds apiece was devised to Daughters, if they married with the Consent of B. and if they married without such Consent, then they should have but Five hundred Pounds apiece, and the Residue should go to the Son; the young Ladies being thirty Years of Age sued for their Legacies here, and it was alledged in their Behalf, that now being of that Age, it was not material whether they married with or without Consent, being of Understanding and Discretion to dispose of themselves.

But it was Resolved, that the Testator was Chancellor of his own Estate, and having added this Restriction, and a Limitation over, this Court could not alter it; and therefore their full Legacies were decreed to them, but they were to enter into Recognizances for Security of Repayment, in Case they married without such Consent. Post Case 132.

And so here the Lord Chancellor would not decree the Portion till Marriage; and then the Counsel of the Plaintiff prest to enlarge the Maintenance, because when no certain Maintenance is expressly allowed, this Court will allot what they think fit; but in this Case he would not extend it beyond the Interest of the Money, because if he should, it would sink the Principal, to the Detriment of those in Remainder. Maintenance. Ante Case 44, 50. Post Case 85, 255.

(66.)

NOTE, That if a Mortgagee be in Possession, and assigneth over, if the Mortgagor prefer his Bill, upon Supposition that the Debt is satisfied, and to have an Account of the Overplus, there he must make the Mortgagee and all the Assignees Parties. Proper Parties. Mortgagee.

But if his Bill be only for an Account, and to pay what is Arrear to the Assignee, there he need not make the Mortgagee a Party.

(67.)

Old Mortgage not redeemable.

A Mortgage was made in 1634, and the Mortgagee above forty Years in Poſſeſſion; and the Mortgagor came now to redeem, but was denied; for my Lord Chancellor ſaid he would not countenance the Redemption of ſuch old Mortgages; and my Lord Bridgeman's Rule was, not to ſuffer a Redemption after twenty Years, and by the Statute an Entry is taken away in that Time; and he ſaid he would in no Caſe ſuffer the Redemption of an Old Mortgage, unleſs the Profits of the Land did conſiderably exceed the Intereſt of the Money.

DE

DE

Term. S. Mich.

1680.

In Curia Cancellariæ.

Hatcher *versus* Curtis & Sir Richard Anderſon. (68.)

L. C. Nottingh. Mss. de eadem causa n°. 988. 1060. & 1061. qui Lezgers copy.

LANDS were conveyed to Truſtees for ſuch Uſes as Mrs. Everſton ſhould direct, limit and appoint; ſhe voluntarily, by Writing under her Hand and Seal, did limit the Uſes to the Plaintiff, (and ſhe being a Feme Covert) the Deed was kept in hers or her Husband's Hands; afterwards ſhe deſtroyeth this Deed, and limits the Uſes to the Defendants, and there was no Power of Revocation reſerved in the firſt Deed. The Queſtion was, Whether ſhe were ſo bound by the firſt Limitation, that it was not in her Power to alter it?

Power executed. Poſt. Caſe 113, 133.

And the Lord Chancellor ſaid though this was a Caſe of Value, yet there was no Difficulty in it; for when the Power was once executed by Deed, there being no Power reſerved by that Deed to revoke or alter it, a ſubſequent Limitation by another Deed will be void; for the firſt Deed, and the laſt Will, always takes Place.

See as to reserving such a power 1 Vern. 355. Prec. ch. Cha. 47. Where the power is equivalent to ownership, it may. Where it is a mere power of disposing, it may not. But even in the last case I have some doubt, where the words are large as to manner as they usually are. S. M.

But otherwiſe it is, if the Limitation be by Will, for there the Party may make his Will toties quoties, and the laſt ſhall take Place. Hob. 313.

If a Power be reſerved to limit a Truſt by Deed or Will, if it be once limited by Deed, it can never afterwards be altered; but a Will being of its own Nature revokable and alterable, it may be revoked or altered as

the Party pleaſeth; for Truſts be governed by the Rules of Law, though the Execution of them is compellable only in this Court; but if the Power reſerved to limit by Deed be from Time to Time, then he may limit and revoke toties quoties.

(69.)

Account ſtated. Poſt Caſe 253.

IF a Man preferreth a Bill generally for an Account, an Account ſtated is a good Plea; but if in his Bill he ſetteth forth that there was an Account, and that there was a Miſtake, and ſetteth forth the particular Miſtake, there an Account ſtated is no good Plea; per Hutchins & al'.

(70.)

Hunt *and* Baker.

Truſt of a Term for Years. Poſt Caſe 157. Caſe 127. con.

IT was ſaid per Winnington, and not denied, that where a Truſt of a long Term is limited to the Husband and Wife for their Lives, with a Remainder to the Heirs of the Body of the Wife, there after the Death of the Husband the Wife hath the Diſpoſition of the Truſt of the whole Term, and after her Death her Executors or Adminiſtrators; and where the Remainder was limited to the Heirs of the Body of the Husband, there the Wife being Adminiſtratrix to the Husband had Power to diſpoſe of the Truſt of the whole Term.

If a Man marrieth a Feme who is the Ceſtuy que Truſt of a Term, if ſhe dieth, this Truſt will not ſurvive to the Husband, but ſhall go to the Executor or Adminiſtrator of the Wife; and this was ſaid to be Witham's Caſe; and that is the Difference where the Wife hath an Eſtate in Law in a Term, and where ſhe hath only a Truſt.

1 Inſt. 351.

DE
Term. S. Hill.
1680.
In Curia Cancellariæ.

Mr. Varnees's Caſe. (71.)

Lord Chancellor. Relief againſt a bad Bargain.

ONE Mr. Varnees a young Gentleman, in Conſideration of 100 l. given him in the Life-time of his Father, did give a Bond for 600 l. to be paid within a Year after the Death of his Father (to whom he was Heir). The ſaid Bond being ſued, he preferred his Bill to be relieved, and was relieved, repaying the ſaid 100 l. and Intereſt.

(72.)

Power executed. Vide poſt Caſe 113, 137.

A Man made a Settlement with Power of Revocation, and limiting new Uſes, in the Preſence of three or more Witneſſes, and he revoked, and limited new Uſes by his Will, in the Preſence of two Witneſſes: And decreed by the Lord Chancellor to be good enough; for the appointing three Witneſſes was only that there might be clear Proof that it was done; and here it was clear enough, though here were only two Witneſſes.

Flay

(73.) Flay *verſus* Flay.

Lord Chancellor.

Paraphernalia. Deviſe of Houſehold Goods. Poſt. Caſe 204. Off Exec. 361.

A Man deviſeth his Houſhold Goods and Stuff to his Wife, and died, having made his Daughter Executrix. The Queſtion was, Whether or no by this Deviſe the Wife ſhould have the Plate that was commonly uſed about the Houſe, viz. a Silver Tankard, 12 Silver Spoons; and likewiſe whether ſhe ſhould have a Bracelet which ſhe uſed to wear, and ſome Pieces of old Gold, viz. two Pieces that were given her to join in a Fine by her Husband, and ſome other Pieces that were given her before Marriage by her Godfathers and other Friends, which ſhe had kept all the Time of her Marriage.

Reſolved, That the Tankard and Spoons, commonly uſed about the Houſe, will paſs by the Deviſe of Houſehold Goods; and for the Bracelet and the Pieces of old Gold which her Husband gave her, and permitted her to uſe and to diſpoſe of in his Life-time, it cannot be intended that he did deſign to take them away at his Death without expreſs Words; and ſince the Wife might have diſpoſed of them, and have ſold or ſpent them, but ſhe hath not, but hath been a good Houſewife and ſaved them, they ſhall not now be taken from her, there being no want of Aſſets for Payment of Debts.

(74.)

Per Juſtice Jones; and the Lord Chancellor ſeemed to allow this Difference. Legacy when payable. Ante Caſe 26.

IF a Legacy be given to an Infant to be paid at his Age of 21 Years, and the Executor to pay Intereſt for it until it became payable; if the Infant die before 21, it is due preſently to the Executor or Adminiſtrator of the Infant; but if no Intereſt was to be paid for it, then it ſhall not be paid until ſuch Time as the Infant would have come to 21 in Caſe he had lived; becauſe there it is a Benefit the Teſtator intended to the Executor by keeping it in his Hands; but in the other Caſe it could be none, when Intereſt was payable.

DE

DE
Term. S. Trin.
1681.

In Curia Cancellariæ.

(75.)

Copyhold.

IF a Copyholder do for a Valuable Consideration sell or Mortgage, or covenant to convey his Copyhold, and dieth before any Surrender made, the Heir is compellable to surrender according to the Agreement of the Copyholder; but if a Copyholder deviseth his Copyhold, and make no Surrender to the Use of his Will, the Heir shall not be compellable to make this good to the Devisee. Post Case 128, 272 b. 304.

But it was made a Quære, if a Copyholder do devise Lands for the Payment of his Debts, and dieth without making any Surrender, whether the Heir be in this Case compellable to make a Surrender; and the better Opinion seemed that he should not, because although this be for Payment of Debts, yet it is merely voluntary to devise his Copyholds; and the Master of the Rolls said, that if this should be allowed the Lord would be cousened of his Fine.

(76.)

Devise of Lands mortgaged.

If a Man deviseth Lands that are in Mortgage, the Equity of Redemption will pass to the Devisee; and so if Copyholds that are in Mortgage are devised, the Equity of Redemption shall pass to the Devisee.

Tiffin *verſus* Tiffin.

(77.)

Term to attend the Inheritance. Poſt Caſe 157, 243.

A Long Term for Years was kept on Foot upon Truſt to attend the Inheritance; he that had the Inheritance deviſeth the Lands by a Nuncupative Will, which was reduced to Writing in his Life-time; but the Directions in the Statute of this King againſt Frauds and Perjuries, was not purſued. The Queſtion was, Whether or no this Deviſe ſhould operate upon the Truſt of the Term which was in him, by Reaſon it could not operate upon the Inheritance, becauſe the Statute was not purſued.

And it was held clearly by the Lord Chancellor, that it ſhould not; for if this ſhould be permitted, it would in a great Meaſure fruſtrate the End of that Statute; for it is very frequent now in Settlements that ſuch Leaſes are kept out to attend Inheritances; and theſe Leaſes are in a manner Part of the Inheritance, and ſhall not be ſevered from them in any Caſe whatſoever, unleſs it be for Payment of Debts; and he ſaid it had been adjudged in this Court, that if a Term for Years be in Truſt to attend an Eſtate-Tail, if Tenant in Tail commit Felony, the King ſhall not have the Benefit of the Truſt of this Term, but it ſhall attend the Eſtate-Tail in the Heir.

Cuſtom of London.

And if a Citizen of London have a Truſt of a Term attending his Inheritance, and dieth, the Truſt of the Term ſhall not be ſubject to the Cuſtom of London, to be divided between the Wife and Children, &c. as other Perſonal Eſtate and Chattels ſhall.

Dower. Poſt Caſe 285.

A Woman recovered her Dower of an Inheritance, that had a Truſt for Years attending upon it with a Pepper-Corn Rent; ſhe was endowed of the third Part of the Pepper-Corn Rent, and preferred her Bill to have the Benefit of the Term, in Lord Bridgman's Time, who ſeemed at firſt inclinable that ſhe ſhould have it, but afterwards, upon Conſideration, ordered that ſhe ſhould not; for it ſhall not upon any Account whatſoever be ſevered from the Inheritance, unleſs it be for Payment of Debts, and there it ſhall; for a Man hath no Right in Conſcience to any Eſtate, to leave his Debts unpaid.

Bravell *versus* Pocock. (78.)

A Man devised 3000 l. to his Daughter, and the Residue of his Personal Estate he devised to his Brother. The Question was, Whether this Daughter should have her customary Part besides this Legacy, by Reason that he gave the Residue to his Brother, which is a kind of an Implication, that the Daughter should have the 3000 l. and no more; and if she should have her customary Part too, there would be nothing left for the Brother. Custom of London. Ante Case 30. Post Case 353.

But the Lord Chancellor held clearly, that she should have her Legacy and her customary Share too; there being no Words in the Will to exclude her, she shall not be barred by Implication; and if there were nothing left for the Brother, he could not help that; it must go as far as it would.

It was likewise held in this Case, that if a Woman before Marriage agrees to a Jointure in Bar of her customary Part, that this Agreement shall bind her, and she shall never after sue for her customary Part.

Newcombe *versus* Bonham. (79.)

ANthony Yong, for 1000 l. Consideration, conveyed Lands to Bonham & ux', and the Heirs of Bonham (who married his Sister) and, in another Deed made at the same Time, Bonham redemised Part of the Lands to Yong for 99 Years, if he lived so long, and covenanted that in case Yong, during his Life and during the said Term of 99 Years, should pay Bonham 1000 l. with Interest, then Bonham and his Wife were to regrant the Fee to Anthony Yong; Yong in the same Deed covenants, that in Case he did not pay or tender the 1000 l. with Interest, during the Term and during his Life, then neither the said Yong nor his Heirs should have any Benefit in Law or Equity of the said Covenant, but should be excluded from all Equity of Redemption. Yong died; the Plaintiff's Wife being Heir at Law to Yong perferred her Bill to redeem; and it was insisted upon by Serjeant Maynard, &c. that this was a Bargain and a plain Purchase, and no Mortgage; and though he had a Power during his Life to redeem, yet it was his Intention that his Heirs should not; and here the Mortgage when redeemable. Post Case 81.

the Defendant might be at great Damage; for if Yong had lived twenty Years, the Defendant was to have no Interest for his Money all that Time; and then if he might come any Time and pay him his Money with simple Interest, or his Heir after, this would be a great Prejudice to him.

Post Case 95, 325.

But the Lord Chancellor held clearly, that he should redeem; for being once redeemable and once a Mortgage, the Negative Words shall not make it otherwise; and if this should be suffered, the Scriveners would quickly get this Way, and cousen Mortgagors out of their Estates; that if the Mortgagors did not redeem during their Lives, it should never be redeemable by the Heirs; and he cited a Case between Hamond and Harris, where a Mortgage was made, and there was this Clause in it, That if he, or the Heirs Male of his Body, should pay the Money in such a Time, that it should be redeemable; but if he, nor his Heirs Male, did not pay it in the Time, that then it should not be redeemable.

The Mortgagor died without Issue Male, and yet the Heir general was admitted here to redeem. And the Lady Jason's Case was cited, where all the Negative Words imaginable were inserted in the Deed, to bar the Equity of Redemption, and all manner of Circumstances sworn, that might conduce to the hindering of the Redemption, and yet the Party decreed to redeem. And another Case between Illington and Gardiner, in this very Point, where a Mortgage was made for 100 l. with a Condition that if the Mortgagor did in eleven Years, and in his own Lifetime, pay the 100 l. and Interest, then the Mortgage to be void; the Mortgagor died, and yet there his Heir did redeem.

It was said at the Bar, that if a Mortgage was made upon Condition to be void upon Payment of a certain Sum of Money at a Day, but if the Money be not paid at the Day, and the Mortgagee do pay a farther Sum to the Mortgagor, then the Mortgagor to be concluded of the Equity of Redemption; if the Mortgagee pay the Money, and the Mortgagor accept it, that then he shall be barred; for this is quasi a new Agreement; but the Mortgagor is not bound to accept it, but may redeem at any Time, until he is concluded by the Court.

And putting in Negative Words signifies nothing, viz. to say, if the Money be not paid at such a Time, that it shall not be redeemed; for if that should be suffered, the Scriveners would cousen all Mortgagors out of their Estates.

Note; In the Caſe ſupra, it was thought hard by ſeveral at the Bar, that the Plaintiff ſhould be permitted to redeem, againſt the expreſs Agreement of his Anceſtor.

Hodgkins *verſus* Lutwych. (80.)

IT was ſaid in this Caſe, that if Mortgagee be in Poſſeſſion, and levy a Fine and five Years paſs, that this ſhall bar the Equity of Redemption, and an Entry of the Mortgagor will not prevent it, becauſe his Entry is not lawful; but the Mortgagor ought to bring his Subpœna. Time a Bar of Equity of Redemption.

Sir Robert Jaſon *verſus* Eyres & al'. (81.)

UPON the Marriage of the Plaintiff's Father with the Lady Eyre, who had 2000l. Portion, it was agreed that the Manor of Hinton ſhould be ſettled upon her for a Jointure; but it being charged with a Mortgage of 4000 l. to one Fiſher, it was agreed that the 2000l. Portion ſhould be paid to the ſaid Fiſher in Part of the ſaid Mortgage; and the ſaid Sir Robert the Father was to have three Years Time for Payment of the Reſidue. Lord Chancellor. Mortgage when redeemable. Ante Caſe 79.

The 2000 l. Portion was paid towards the Mortgage, and for ſecuring the 2000 l. Reſidue and the Lady Eyre's Jointure, a Leaſe of 500 Years was made of the Premiſſes to Tench Fiſher and Travers, in Truſt for Fiſher, redeemable on the Payment of the ſaid 2000 l. and Intereſt; and after ſuch Leaſe made, the ſaid Fiſher was to join with the ſaid Sir Robert Jaſon, in granting the Reverſion and Inheritance of the Premiſſes to Carey and Holbeech, and their Heirs, to the Uſe of Sir Robert for Life, Remainder to the Lady Eyre for Life, for her Jointure, Remainder to the ſaid Carey and Holbeech, and their Heirs, upon ſeveral Truſts therein mentioned touching the Payment of the ſaid Money; but in Caſe the ſaid Sir Robert ſhould not pay the ſaid Money at the Time for Payment thereof, or in Default thereof, ſhould not within the Term of three Years pay the Debt and Intereſt which ſhould become due, or that Sir Robert ſhould die before the ſame be paid, and the Leaſe ſurrendered, that then in any of theſe Caſes the ſaid Carey and Holbeech ſhould ſtand and be ſeiſed of the Reverſion and Inheritance of the Premiſſes to them limited, expectant on the Eſtate ſo to be limited to Sir Robert and the

Lady Eyre respectively, in Trust for the Lady Eyre, her Heirs and Assigns, not only to discharge the Debt and Interest, whereby to free her intended Jointure from the Lease of 500 Years, but for the Increase of her Fortune, and to the End she might enjoy the Inheritance of the Premisses absolutely to her and her Heirs, discharged of all Equity of Redemption, according to the said Agreement. Accordingly Deeds were executed.

In June 1674 the said Marriage took Effect; in March following Sir Robert died, before three Years expired, not having paid the said 2000 l. and the Plaintiff, being his Son and Heir, preferred his Bill to redeem.

And the Lord Chancellor was clear of Opinion, that the Plaintiff ought to redeem, and declared that though the Deed be never so strong to secure the Jointure, yet after all, if it be once a Security, no Words in the same Conveyance for excluding the Redemption, in Case of a Failure to do it by the Time thereby limited, can bar a Redemption; and if Sir Robert the Father had out-lived the three Years, and had not paid the Money, he could not have forfeited the Equity of Redemption to his Wife, but he should have had the Redemption, though the three Years were expired; and if he was not concluded, neither is the Heir.

And therefore it was decreed, that he paying off the said Mortgage, the Trustees should convey the Equity of Redemption to him, and the Lady Eyre to have her Jointure for her Life.

Note, That this Case I took out of the Decretal Order.

(82.) Chiswell *versus* Blackwell.

Lord Chancellor.

Feme Covert makes a Will.

IN this Case it was declared by the Lord Chancellor, if the Wife do make a Will, and give Legacies, &c. although the Husband did promise her to perform it, and gave her Leave to make it, nay although he did after the Death of his Wife assent to it, yet he is not bound by it, and the Performance of it in him is only Honorary, unless the Husband did agree before Marriage, that she should do it, and then he will be bound by his Agreement, but all Promises after, nay if the Wife make him Executor, and he prove the Will, yet he is bound no farther than in Honor; for the Will of a Wife is a void Thing, and it is in strictness no Will; and if a Bond be given to perform the Will of a married Woman, and she make a Will, it hath the Import of a Writing, and nothing else.

Semble a moy q' ceſt Opinion eſt contrary a les Rules del Civil Ley, q' eſt tenus la q' ſi le baron aſſent, q' le volun eſt bone.

Bevant *verſus* Pope. (83.)

A Copyhold is granted to A. in Truſt for B. A. dies leaving a Widow, who by the Cuſtom of the Manor is intitled to her Widow's Eſtate; the Queſtion was, Whether or no ſhe ſhould have her Widow's Eſtate, and not be liable to the Truſt. And it was held that ſhe ſhould not, no more than the Wife of a Truſtee ſhall have Dower; for the Widow's Eſtate ſprings out of the Truſt-Eſtate by the Cuſtom, as Dower doth by the Common Law.

Truſt of a Copyhold, the Widow's Eſtate ſubject. Ante Caſe 48, 77.

(83 b.)

THIS Rule was laid down per Cancellar', that if a Man prefer a Bill for a Thing of which the Court hath Juriſdiction, there the Plaintiff need not make an Affidavit that he hath not the Writings; but if it be to intitle the Court to a Juriſdiction, there he muſt; as if a Man bring a Bill to be ſatisfied a Debt upon a Bond, and pretend the Bond is loſt, he muſt make Affidavit of it; for if the Bond be not loſt, this Court hath no Juriſdiction; but in this Caſe the Bill was brought for Diſcovery of Writings, and that the Lord Chancellor ſaid the Court had a Juriſdiction of, and there needed no Affidavit that the Plaintiff had them not.

Affidavit of Writings loſt.

DE
Term. S. Mich.
1681.
In Curia Cancellariæ.

Charles Howard *verſus* Henry his Brother, Duke of Norfolk.

I. C. post. 90. 3. Cha. Cas. 1. 2. Cha. Rep. 229. Pollex. 223. 1. Vern. 163. L^d Nott. Mss. Rep. N.° 1142. 1152.

(84.)

Lord Chancellor, Chief Juſtice North, Chief Juſtice Pemberton, Chief Baron Mountague.

Truſt of a Term for Years. Poſt Caſe 87. 2 Rep. C. 229.

THE Earl of Arundel, having Iſſue Thomas, the Lord Moltraves his eldeſt Son, Henry the Defendant his ſecond Son, the Plaintiff his third Son, Edward his fourth Son and Bernard his fifth Son, being ſeiſed of the Barony of Graneſtock, &c. in Fee-ſimple, conveys the ſame to the Uſe of himſelf for Life, Remainder to his Lady for Life, Remainder to Truſtees for 200 Years, Remainder to the Defendant and the Heirs Male of his Body.

By another Deed, bearing Date the ſame Day, wherein he declares the Truſt of the Term for 200 Years, he makes a Recital of the ſaid Term, and of his Intention, that it ſhould attend the Inheritance, and then declares the Truſt in Manner following, viz. that they ſhould permit Henry Howard the Defendant, and the Heirs Male of his Body, to receive the Profits; but in Caſe Thomas, Lord Moltraves, ſhould die without Iſſue Male of his Body, whereby the Dignity of the Earl of Arundel ſhould deſcend upon Henry, that then they ſhould permit Charles the Plaintiff, and the Heirs Male of his Body, to receive the Profits; and in Caſe he ſhould die without Iſſue Male, then to

permit Edward and the Heirs Male of his Body to receive the Profits; and for Default thereof to Barnard.

The Earl of Arundel and his Lady are dead, and Thomas, Lord Moltraves being dead without Issue, in the Life of Henry, the Earldom descended upon Henry.

The surviving Trustee conveyed over the Term to Henry, but before the Conveyance of the Term to him, Henry suffered a Recovery of the Lands in Question, to the Use of him and his Heirs.

Charles, the Plaintiff, preferred his Bill against the Defendant, to have the Trust and Estate executed to him according to the aforesaid Limitation; the Lord Moltraves being dead without Issue Male, and the Earldom being descended upon the Defendant.

Two Questions were made:

1. Whether this Limitation of the Trust of the Term to Charles, after it was limited to Henry and the Heirs Male of his Body, upon the Contingency aforesaid, was not void in its Creation?

2. Admitting it to be good in its Creation, Whether it was not barred by the Recovery suffered by Henry, the now Duke?

To the first Point it was argued by Maynard the Attorney General, Williams & al', that this was a good Limitation of a Trust of a Term in its Creation.

For although it be true, that a Trust of a Term cannot be limited in Tail with Remainders over, yet here it depending upon a Contingency, which must be determined in the Life of a Man, it is all one as though it had been limited for Life with Remainders over, which hath always been admitted to be good ever since the Resolution of Matthew Manning's Case, 8 Co. 95. and if by any Rules of Law or Equity it can be made good, it ought to be so here; for this Trust was limited to Henry whilst his Brother was living; but if his Brother should die without Issue, whereby the Honour and great Possessions belonging to it should come to Henry, then the Father designed it to be a Provision for the Plaintiff, considering that the Defendant would then be amply provided for, and stand in no need of it; so that it was plainly the Intent of the Father, who made the Settlement, and had Power of the Estate.

And admitting that this Term, if it be considered abstractedly, could not be so limited, yet this is attendant upon the Inheritance, so long as the Limitation of the Term

and the Eſtate are the ſame; and afterwards it comes to be a Term in Groſs, and ſo may be good to the Plaintiff, although the Remainders over are void.

It is agreed by all, that a Term limited to attend an Inheritance may have as many Limitations and Remainders as the Inheritance; but then it muſt take its Fate with the Inheritance, and that which bars the Inheritance will bar the Truſt of the Term; quod fuit conceſſum per omnes, if it were a Term merely attendant.

Poſt Caſe 127. If a Truſt of a Term be limited to A. and the Heirs Male of his Body with Remainder over, the Executor or Adminiſtrator of A. ſhall have the whole Term; and ſo it is, if it be limited to A. ſo long as B. ſhall have Heirs of his Body; quod fuit conceſſum.

And this can be no Perpetuity, becauſe the Reſtraint of Alienation is only during the Life of one Perſon; and it hath always been held, that if forty Lives be in Being, a Term may be limited to all of them ſucceſſively, becauſe they are like ſo many Candles which are all lighted together, and muſt expire; and therefore it can have no Tendency to a Perpetuity; quod fuit conceſſum per Curiam.

Why then the Caſe here is, That here is a ſucceſſive Limitation upon a Contingency, which muſt determine in the Life of a Perſon; and though it be limited to Henry and his Heirs Male of his Body, Heirs Male is void until the Contingency be determined, becauſe non eſt hæres viventis, and the Contingency was to determine in the Life of Henry; and they cited the Caſe of Cotton and Heath, 1 Roll. 612.

And they ſaid the Reaſon of the Caſe of Child and Bayly was quite different from this, for the Reaſon why they adjudged the Limitation over in that Caſe to be void, was becauſe of the Repugnancy; for there the whole Term was deviſed to the firſt Perſon and his Aſſigns, and then to limit a Remainder over was repugnant, like the Caſe of Stukely and Butler in Hob. Rep. where an Eſtate given to a Man and his Aſſigns, provided he ſhould not alien, was held void; and they relied much upon the Caſe of Pell and Brown, where it is held a Fee may be limited upon a Fee, determinable upon a Contingency to happen in a ſhort Time.

As to the ſecond Point, it was argued for the Plaintiff, that this Limitation of the Truſt over was not barred by the Recovery.

It was admitted, that if it had been a Term merely attendant upon the Inheritance, that which had barred or al-

tered the Inheritance would have barred or altered that; but this was a Term in gross, when the Trust of it and the Inheritance came to be divided in their Limitations, and this Trust was precedent to the Estate-Tail; and although a Recovery will bar any Limitations subsequent to the Estate-Tail, or any Charges upon the subsequent Remainders, yet what is precedent to the Estate-Tail, or chargeable upon it, (as a Rent-Charge, &c.) it is not in the Power of Tenant in Tail to bar or destroy.

It was argued for the Defendant by Pollexfen, Keck, Winnington, &c. who went upon the Points.

1. As to the first Point, they held that the Limitation of the Trust to Charles was void in its Creation; for after it was limited to Henry and the Heirs Male of his Body, it could not be limited over, notwithstanding that it was but until Thomas his elder Brother should die without Issue Male of his Body, whereby the Earldom should descend upon Henry.

And they laid it down for a Rule, that when the Trust of a Term for Years is once limited to a Man and Heirs of his Body, let it be determinable upon what Contingent it will, it cannot be limited over; for if that should be once suffered, there will be no Bounds to it, for as it may be limited upon a Contingency to happen in one Life, so likewise it might in two, and so to twenty; and so likewise if it was upon a Contingency to fall out in a certain Number of Years, it might be ten, twenty or One hundred Years, which must needs tend to a Perpetuity.

And they observed that once an Opinion did prevail, that the Limitation of a Trust of a Term might be in Tail with Remainders over, as appears in Moor 807, 808. but the contrary was since held, as in Moor 809, 567.

And though the Contingency is to fall out in a short Time, that is not material; for if the Term were ever so short, such a Limitation would be void, and yet there it can have no long Continuance; as in the Case of Child and Baily the Term was but seventy-six Years, and the Case of Lowe and Windham was but a Term of ninety-nine Years, determinable upon Lives, 1 Cro. 276. 1 Roll. 612. 2 Cro. 298. Mallot versus Sackville.

And they said the Case of Pell and Browne was nothing to this Case, for that was a Limitation of a Fee, and a great Reason of that Case was upon the Construction of the Statute of Wills, which gave Men Power to devise

Lands

Lands of Inheritance which they could not at Common Law.

The Judges have always looked upon the Resolution in Matthew Manning's Case to be to the utmost Extent, and have often said they would never go beyond that, and a great Reason of that Resolution was taken from Boothby's Case, Dy. 24.

They cited the Case of Perne versus Reeves, 13 Car. 2. B. R. a Devise of a Term to A. for Life, then to his Wife for Life, then to their Children with Remainders over; the Remainders over were held to be void. And the Case of Lowe and Wyndham was adjudged in the King's Bench, 22 Car. 2. A Devise of a Term to his Wife, then to Nic. his Son, and if he die without Issue, Remainders over; the Remainder over was held to be void.

And they said that the Case of Child and Baily was a stronger Case than this; and for the Case of Pell and Brown, that was adjudged by the same Judges as Child and Baily, and if we look to the Times, it was betwixt the Judgment given in Child and Baily's Case and the Affirmance of it in the Exchequer; and therefore certainly those Judges did not take the Reason of those Cases to have any relation to one another.

And they said, another Reason why it was bad, was because here was a Possibility limited upon a Possibility, which the Law will not endure; for here must be a dying by Thomas without Issue, and the Honour must descend upon Henry, and this dying without Issue must be in the Life of Henry. But to that it was answered, that that is not a Possibility upon a Possibility, because all the Contingencies are to determine at one Time, though it is a complicated Possibility; so that taking it to be a Trust of a Term in Gross, it is void in its Creation.

1 Co. 156.
8 Co. 75.

Then to the second Point, Taking it to be a Trust of a Term attendant upon the Inheritance, it is barred by the Recovery; for that which bars the Inheritance will likewise bar the Trust of the Term attendant, which was admitted, taking it to be a Trust purely attendant.

And they cited the Case of Hudson and Benson, 25 Car. 2. B. R. a Limitation of an Estate to a Man and the Heirs of his Body, and if he died without Issue, then a Rent-Charge to Moseley, and this Rent-Charge was barred by the Recovery.

Tenant in Tail, with Power to make Leases to commence after his Death without Issue, makes a

Lease and suffers a Recovery; this Recovery shall bar the Lease, because a Recovery doth in a manner protract the Estate-Tail, so that the Remainder, nor any Thing out of it, cannot take Effect.

And in Chancery it hath been held, that if a Trust be limited in Tail with Remainders over, if the Cestuy que Trust suffer a Recovery, this will bar all the Trusts in Remainder, though there be no Tenant to the Precipe in Law, &c.

A Recovery bars all Remainders and the Dependencies of them; so that it hath been held, that if a Term for Years be granted to commence after the Death of J. S. without Issue, and afterwards an Estate is granted to J. S. and the Heirs of his Body, that J. S. may bar this Lease by a Recovery, notwithstanding it was granted before the Estate-Tail was created; and so it was held in the Case of Southam versus Clarke, although in the Case of Gooden and Clarke it was held otherwise, and so that Case is doubted.

So that they concluded, that if it be a Term attendant, it is certainly barred by the Recovery; if it be a Term in Gross, it is void in its Limitation; and to make it partly attendant so long as it went with the Estate, and then to leap off and subsist by it self, would be a very strange Construction, and the Way to bring in Perpetuities, which the Law abhors, and would be contrary to the Reason which alloweth the Intailing of a Trust of a Term, so long as it attends the Inheritance, which is because then it stands and falls with the Inheritance, and so there is no Danger of any Perpetuity. Curia advisare vult.

Afterwards in Hillary Term following, the Lord Chancellor, the two Chief Justices and the Chief Baron, gave their Opinions seriatim; and the Judges were all three of Opinion, that the Limitation to Charles was void; and they went upon Child and Baily's Case, and held that the Limitation over of the Trust of a Term, after it was limited to a Man and the Heirs of his Body, though it was upon a Contingency, was void; and that they would not carry it farther than the Judges had done in Matthew Manning's Case. Post Case 87.

But Chief Justice Pemberton said, that such a Provision might have been made well enough another Way, and that had been by creating two Terms, viz. to have limited a Term for sixty Years to this Duke and the

Heirs of his Body; proviso that if the Lord Moltraves should die without Issue, whereby the Dignity should descend upon him, then that Term to cease, and a new Term to arise, to be in Trust for Charles and the Heirs of his Body, &c. and this would have been well enough, Vide post Case 87.

(85.) Swinnock *versus* Crisp.

Maintenance of Children Legatees. Ante Case 65. Post Case 255.

THE Defendant married the Plaintiffs Mother, who was Executrix to her former Husband (the Father of the Plaintiffs) who devised the Sum of Two hundred and fifty Pounds amongst the Plaintiffs (three of his Children) who being bred up by the Defendant now sued for those Legacies.

The Defendant alledged that he had maintained them for several Years, and given them good Education, which cost him much more than the Interest; and that he had bound one of them Apprentice, and given Seventy Pounds with him; and for this he prayed, that what it stood him in more than the Interest, might be allowed him out of the Principal.

But the Court would not allow any Thing out of the Principal towards their Maintenance, but only the Interest, by Reason that the Defendant had married the Mother, who was bound to maintain her own Children, but for the Seventy Pounds which was paid to put one of them Apprentice, that was allowed out of the Principal.

(86) Hunt & Pit *versus* Pit.

Baron n'ad Power del Term in Trust pur le Feme.

A Feme, possessed of a Term for Years, conveyeth it to Trustees in Trust for her self, and then taketh Husband. And the Question was, Whether or no the Husband had Power to dispose of this Trust of the Term?

Post Case 157, 174.

And it was said per Cancellar', that it had been always held, that the Husband had no Power of a Trust for the Wife of a Term for Years; but in the Case of Sir Edward Turner, this Point came before the Lords, and the Lords ruled it otherwise (contrary to his Opini-

Ante Case 32. 3 Ch. Rep. 307.

on); and ſince the Lords had ſo done, they had altered the Law in that Particular; and therefore he declared his Opinion to be, that the Husband had Power over this Truſt of the Term; and though it appeared in this Caſe, that the Husband had Notice before the Marriage, that the Wife had ſettled the ſaid Term in Truſtees, yet that would not hurt him, becauſe if the Law be, that he ſhould have Power of it, his knowing it would in no Sort prejudice him.

But if a Man before Marriage be made a Party to diſpoſing of a Term for Years, in Truſt for his Wife for her Jointure, or for ſeparate Maintenance, or do make an Agreement not to diſpoſe of it, there it ſhall not be in his Power to diſpoſe of it. Poſt Caſe 88.

DE

DE
Term. S. Hill.
1681.
In Curia Cancellariæ.

(87.) Charles Howard *verſus* Henry his Brother, Duke of Norfolk.

Ante Caſe 84. THE Lord Chancellor gave his Opinion contrary to the Opinion of the three Judges, that the Limitation to Charles was good; for although there was a Limitation to Henry and the Heirs of his Body, yet that was upon a Contingency which was to determine in a ſhort Time, to wit, in the Life of Henry; and as for the Reſolution of Child and Baily's Caſe, there
2 Cro. 461. were ſeveral Circumſtances in that Caſe which were not in this; for there one Reaſon given in Roll's Abridgment was, becauſe the Deviſe to the firſt Man was to him and his Aſſigns, which in a manner gives a Liberty to diſpoſe of the Term, and then the Deviſe was of all his Title and Intereſt in the ſaid Lands, which ſeems repugnant to a Limitation over; and it appears by the Record of that Caſe, that the Term had been ſeveral Times aſſigned, and there were ſeveral Purchaſers before the Cauſe came in Queſtion, which was fifty or ſixty Years after the ſaid Settlement; but admitting that the Caſe had been the ſame, yet there have been different Opinions ſince in Weſtminſter-hall; and he cited a Caſe between Wood and Saunders, adjudged by the Lord Keeper Bridgman, aſſiſted by Raynſ-

ford and Twisden, where a Trust of a Term was limited to the Father for Life, then to the Mother for Life, then to the Son John, and the Heirs of his Body; provided that if John should die without Issue in the Life of his Father or Mother, then the Trust should be for Edward the second Son; and it fell out that John died without Issue in the Life of his Father; whereupon after the Death of the Father and Mother, Edward preferred his Bill for this Term; and it was decreed to him, by Reason that, although there was a Limitation to John and the Heirs of his Body, yet it being upon a Contingency which was to determine in the Space of two Lives, it was held well enough, which was a stronger Case than this; for here it is to determine in the Space of one Life; and he said he could not tell how to difference this Case from what my Lord Chief Justice Pemberton admitted, which was, that this Provision might have been well enough made, by limiting one Term to spring upon the Determination of another; for there is the same Reason to limit one Trust of a Term to spring upon the Determination of another.

And he said that in every Case, where upon a Contingency a Fee might be limited upon a Fee, upon the same Contingency the Trust of a Term might be limited after another Trust of the same Term; and that is the Reason of Pell and Brown's Case, viz. That although there was a Fee limited before, yet it was upon a Contingency, which was to determine in the Life of a Man, and therefore held good.

And he said it would be very inconvenient, if over strict Constructions should be made to destroy the Limitations of Trusts of Terms; for suppose a Man hath a Term for Years, and makes a Marriage Settlement, and assigns the Term in Trust for him, his Executors and Administrators, until the Marriage; and after the Marriage, then upon such other Trusts as are agreed upon; no Man ever said that this Limitation was void, because it was first limited to a Man, his Executors and Administrators, there being a Contingency to determine it in a short Time.

And as to the Objection that was made, Where shall it stop? for if it may be good after a Limitation to a Man and his Heirs, determinable upon a Contingency to happen in the Space of one Life; so likewise for two Lives, and so to twenty Lives. To that he answered, that Westminster-hall will quickly stop it, when they find it tends towards a Perpetuity, or when they find any Inconvenience

in it; but when the Contingency is to determine in one of two Lives, there is none; and to he was of Opinion upon the whole Matter, that the Plaintiff ought to have the Term decreed to him, and an Account of the Profits since the Death of the Lord Moltraves.

But, by Reason the Judges were of a contrary Opinion, he suspended the Entering up of the Decree till he should further consider of it, and it may be he might at last think fit to adjourn it into Parliament.

Note, That one Thing, that moved him to give this Opinion in this Case, was, because at the Time of the making of this Settlement the Lord Moltraves was a very weak Man, and so it was no remote Expectation that he should die without Issue.

Bullock *versus* Knight.

(88.)

Trust of a Term limited.

William Bullock possessed of a Term for 1000 Years (upon the Marriage of Henry his Son with Bridget the Daughter of Sir John Knight,) grants this Term to Sir John Knight, in Trust for William until the Marriage, and then for Henry during his Life, and no longer, and after his Death for Bridget during her Life, and no longer; and after their decease, then to the Issue of their two Bodies, to descend in Nature of a special Intail, so long as they continue in rerum Natura; and for Default of such Issue, then in Trust for the Executors of Henry, during the Remainder of the said Term?

The Marriage took Effect, and they had Issue; Henry assigned all his Estate and Interest, &c. to the Defendant, and then died, and Bridget and the Issue died; and the Plaintiff took out Letters of Administration to Bridget and to the Issue; and the Question was, Which of them had the best Right to the Remainder of this Term.

On the Plaintiff's Part it was urged, that if the Issue took any Estate in this Trust, that then he had a good Title as being Administrator to the Issue; for if he took any Thing he took all, and the Remainder over to the Executors of Henry was void. And if the Issue could take nothing, but the Limitation to them was void, then the Trust of the whole Residue of the Term was vested in Bridget by Survivorship, and then the Plaintiff had a Title as being Administrator to Bridget.

For the Defendant it was urged, that the Issue could take nothing, but the Limitation was void; for Issue shall not take by Way of Purchase in this Case, but shall be taken as Words of Limitation; and that Way the Issue cannot take, for that would be to make an Intail of a Term; therefore if a Trust of a Term for Years be limited to A. and his Issue, the whole Term vests in A. then admitting that the Issue took nothing, then the Trust of the whole Term was vested in Bridget by Survivorship, and then although the Husband could not dispose of so much of the Term as was limited to her for her Life upon the Marriage Settlement, yet this Residue, which vested in her by Survivorship, the Husband might well dispose of. Ante Case 86.

The Lord Chancellor said this was a new Case, and he would consider of it.

Horrell *versus* Waldrup.

I. C. 1. Vern. 26. 2. Cha. Cas. 85. (89.)

Legacies. Demurrers.

THE Plaintiff was sued in the Ecclesiastical Court for Legacies, and preferred his Bill here to be indempnified in the Payment of them; and the Defendant Demurred, because the Conusance of Legacies belongs to the Ecclesiastical Court, and they will take care to indempnify the Party in Payment of them.

But the Demurrer was over-ruled, because this Court hath the proper Conusance of Legacies, and in some Cases this Court will take care for indempnifying the Executor or Administrator, where the Ecclesiastical Court cannot, and will make a Legatee refund, if Debts appear afterwards, if the Legacy be decreed by this Court; and this Court will give Interest for a Legacy, which that Court doth not, and the Plaintiff hath an Election to sue here or there; and this Court holds Plea of Legacies by the Rules of the Civil Law, and therefore a Legacy given upon Condition, that if the Party marry, then to be void; this is a void Condition, because by the Civil Law all Conditions against Marriage are unlawful.

Rogers

Rogers *verſus* Seale.

(90.)

Diſcovery of Writings. Ante Caſe 25, 47.

THE Plaintiff derives his Title under one Jo. Pope, by a Will in 1659, and exhibited his Bill to diſcover Writings in the Defendant's Hands.

The Defendant pleaded, that he purchaſed the Lands in Queſtion of the ſaid Jo. Pope in 1675, for 100 l. without Notice of the Plaintiff's Title, and demands Judgment.

The Plea was over-ruled upon this Difference: Where the Plaintiff hath a Title in Law, there though the Defendant doth purchaſe without Notice, yet he ſhall diſcover Writings; but otherwiſe it is if the Plaintiff hath only a Title in Equity; for there if the Defendant purchaſed without Notice, he ſhall never diſcover, nor make good the Plaintiff's Title.

Thickneſſe *verſus* Vernon.

(91.)

Lord Chancellor.

Survivorſhip. Ante Caſe 23. Poſt Caſe 178.

WHERE there are Joint Tenants or Joint Executors, this Court will not take away the Benefit of Survivorſhip that the Law gives; but if there be any Words to differ it, or in Caſe of a Will any Intent of the Teſtator appear to the contrary, then this Court will not permit the Benefit of Survivorſhip. And a Caſe was cited by the Lord Chancellor, which was decreed before the Commiſſioners, who called Chief Juſtice Rolle to their Aſſiſtance, where Lands were purchaſed in Truſt for two Perſons equally (and did not ſay equally to be divided); and decreed at firſt that the Truſt ſhould ſurvive, but afterwards upon a Bill of Review, by the Conſent of Rolle, that Decree was reverſed.

And a Difference was offered in Relation to Survivorſhip, where a Deviſe was jointly to Executors, and where it is to Reſiduary Legatees, that in one Caſe there ſhould be Survivorſhip, and in the other not; but the better Opinion was, that there was no Difference, but it was all one.

(92.)

Mortgage redeemable.

A Caſe was cited per Cancellar', where an Eſtate was made by Way of Mortgage, with a Proviſo that the Mortgagor, or the Heirs Male of his Body, might redeem; the Mortgagor died without Heirs Male of his Body; and

it was decreed, that the Heir general should redeem upon the Payment of the Principal Money and Interest; for where a Mortgage is once redeemable it is always redeemable, without a new Agreement to the contrary.

(93.)

Power. 1 Co. Mildmay's Case.

IT was said per Cancellar', That where a Covenant was made to stand seised to Uses, and a Power raised thereby to make Leases, (which is void at Law) that Leases being made by Virtue of such a Power, it was decreed in this Court by the Lord Elsmere, that the Lessees should enjoy their Leases.

DE

Term. S. Hill.

1682.

North, Lord Keeper.

UPON the Act of Distribution for Intestates Estates, these Points have been resolved, as it was affirmed to me by Mr. Keck and Mr. Moseley, &c.

1. That the Customary Part, belonging to the Administrator of a Citizen of London dying Intestate, is not within the Act, because the Custom of London being saved by the Act, the Customary Part shall go wholly to the Administrator as it did before; and so it hath been resolved at Common Law, and in Chancery.

2. That where a Man makes an Executor, to whom he deviseth all the Rest and Residue, &c. and this Executor dieth before the Testator, he, that takes Administration cum Testamento annexo, shall be liable to make Distribution of this Surplus within the Act of Parliament.

3. That if a Child dieth, and the Mother administers, she shall not be compellable to make Distribution to any of the Brothers and Sisters of the Intestate.

DE
Term. S. Mich.
1683.

In Curia Cancellariæ.

Howard *verſus* Harris.

(95.)

Mortgage when redeemable.

SIR Robert Howard, by a Settlement in the Family being Tenant for Life, with Remainder to Henry his firſt Son, ſold the Lands in Queſtion to the Defendant; afterwards he dying, his Son Henry defeated the ſaid Purchaſe by Virtue of the ſaid Settlement, and in the Year 1670 mortgageth the ſame to the Defendant for Five hundred Pounds, and then ſettles the ſame upon his Wife, the Plaintiff, for an Addition to her Jointure voluntarily; afterwards the ſaid Henry Howard takes up Five hundred Pounds more of the Defendant, and in the Deed the Proviſo is, that if he or the Heirs Male of his Body ſhould pay, &c. then to be void; and a Covenant that no Perſon ſhould redeem but he and the Heirs Male of his Body, and covenanted likewiſe that the Money ſhould be paid prout.

Henry Howard dies without Iſſue Male, and the Plaintiff being his Widow, and intitling her ſelf by Virtue of the ſaid Deed of Settlement, preferred her Bill to redeem; and a Redemption being decreed by the Lord Chancellor Finch, the Cauſe was now reheard.

On the Defendant's Part it was inſiſted, that here being excluſive Words, no Perſon excluded by them ſhould redeem; for the Mortgagor being Maſter of his own Eſtate

might

might part with it upon what Terms he pleased; and here it did plainly appear that his Intent was, that no Person but himself and the Heirs Male of his Body should redeem.

But the Lord Keeper confirmed the Decree; for it being a Security for Money once, and there being a Covenant to pay the Money, by which Covenant the Mortgagor and his Executors were perpetually obliged, and besides there being no Consideration paid for this exclusive Covenant, he decreed a Redemption according to the former Decree; but seemed to be of Opinion that if there had been any particular Agreement, and a Consideration paid, those exclusive Words might have been effectual; but others were of Opinion, to the Contrary; for once a Mortgage and always redeemable, and no Negative Words shall exclude the Mortgagor. And it was compared to a Distress for Rent, that although there be a Covenant in the Deed, that if the Rent be behind, the Party may distrain and hold the Distress irreplevisable, that notwithstanding the Party may replevy. Ante Case 79. Post Case 325.

But a Case was cited by Mr. Solicitor in the House of Lords, that where a Man made a Purchase, and an Agreement was made between the Vendor and the Vendee, that in case the Purchase Money were repaid within seven Years, that he would reconvey, there if the Money be not repaid in the seven Years, the Party is not bound afterwards to reconvey, there being no Interest to be paid, nor any Covenant to pay the Money. Ante Case 92. Post Case 280 b.

Thexton *versus* Betts. (96.)

Advowson mortgaged.

THE Plaintiff's Testator being Incumbent of a Parsonage, and having a Grant of the next Avoidance, mortgaged the next Avoidance for Twenty-five Pounds; he being Dead, the Plaintiff is his Executor, and brought his Bill to redeem; and the Defendant demurred.

Per Curiam, He shall not redeem, for now the Advowson is become in that Plight, that it cannot be transferred in Law, the Party shall never be decreed here to transfer it; and the Plaintiff's Bill was to be dismist; but if the Defendant takes the Benefit of Presenting, he shall not also sue for his Money.

It

It was proposed, that though the Defendant could not by Law assign the next Avoidance now it is fell, and so could not be decreed to do an act against Law, yet this Court might compel the Mortgagee, upon Receipt of his Money, to present the Nominee of the Mortgagor.

But that the Lord Keeper said he would never do, for that would be for this Court to do the same Thing in Substance which the Law allows not to be done, and might tend to incourage Simony; and therefore he would never do it; and he said the Grant of the next Avoidance comes as near Simony as may be.

Post Case 342.

Fitton *versus* Lord Maxefield.

(97.)

Review.

PER Cur', In a Bill of Review all Things are to be performed according to the former Decree, that do not extinguish the Right; otherwise the Non-performance is a good Plea in Bar, as if Writings are to be brought into Court or Costs paid, but not to release the Right or make a Conveyance, because that would destroy the Right.

Not bringing in Writings according to the Decree sought to be reversed, nor giving Security for the Costs in the Bill of Review, was pleaded in the Cause between Okeover and Poole.

DE

DE
Term. S. Mich.
1684.

In Curia Cancellariæ.

(98.)

A. Devised to B. Twenty Pounds to put him out Apprentice, when he should come to the Age of seventeen Years, and he died before that Age; and the Question was, Whether his Administrator should have it or not? And Resolved that he should.

Legatee dieth before his Legacy is payable. Ante Case 26. Post Case 135.

See 1. Vern. 255. 1. C. as it seems. See further Cope v. Wilmot Atmbl. 704.

Clarke *versus* Jevon.

(99.)

Mortgage redeemable.

DA. Grant, possessed of a Term for Years of Houses in the Strand, mortgageth them to Hynde, and then sells the Equity of Redemption to the Defendant; afterwards the said Da. Grant sells the Equity of Redemption to Geo. Dewy, the Plaintiff's Testator, who mortgaged the same to Sandford; the Defendant Jevon buys in Sandford's Mortgage, paying him his Principal and Interest; Geo. Dewy, dies, and the Plaintiff being his Executor prefers his Bill against the Defendant to redeem.

The Defendant pleaded, that before Da. Grant sold the Equity of Redemption to Dewy he sold it to her for One hundred and fifty Pounds, which she had bona fide paid, and that she had since purchased in the Estate in Law of Sandford, and so demanded Judgment whether she should answer.

And by the Lord Keeper she must answer; for though it be true generally, where a Purchaser of an Equity without Notice gets in an Estate in Law, no Redemption shall be against him; yet here Dewy having taken in the Old Mortgage, and this Mortgage to Sandford being made by him, there is no Case where a Man shall be hindered from redeeming his own Mortgage.

DE
Term. S. Hill.
1684.
In Curia Cancellariæ.

(166.)

Conusee of a Judgment redeems from a Conusee of a Statute, who had taken in a prior Mortgage.

A. Lessee for sixty Years mortgages his Term to B. and then acknowledgeth a Statute to C. and then confesseth a Judgment to D. and dieth; C. the Conusee of the Statute payeth off the Mortgagee, and takes an Assignment of the Mortgage; D. preferreth his Bill against C. to redeem the Mortgage; and the Question was, Whether D. should pay only the Money due upon the Mortgage, or that, and what was due upon the Statute, before C. should be compellable to assign. And per Curiam, C. must assign upon Payment of the Mortgage Money only, for when A. the Mortgagor died, the Equity of Redemption of this Term was Assets in Equity; and as the Judgment shall be satisfied by Assets in Law before a Statute, so it shall in Equity, and though the Conusee of a Statute hath got the Assignment of the Mortgage, yet that shall not take away the Right of Priority, which the Judgment hath by the Law.

Note; The Reason of this seems to be, because the Term was Personal Assets.

DE
Term. Paſchæ
1685.
In Curia Cancellariæ.

Blithe's Caſe.

(101.)

Maſter of the Rolls, Sir Jo. Churchill. Power executed by a Feme Covert.

A Widow having one Child, and being poſſeſſed of a Term for Years, juſt before her Marriage with the ſecond Husband, aſſigns this Leaſe to two Truſtees without the Privity of her Husband, in Truſt that ſhe ſhould receive the Profits during Life, and afterwards in Truſt for her Child for Life, and afterwards upon ſuch Truſts, as ſhe ſhould by any Writing ſigned in the Preſence of two Witneſſes declare and appoint, and then marrieth.

The Husband enjoyed the Leaſe for ſeveral Years during the Life of his Wife, and after the Death of the Wife the Child received the Profits during his Life.

The Wife, during her Coverture by the ſecond Husband, by Deed under Hand and Seal, in the Preſence of two Witneſſes, appoints the Truſtees after the Death of the Child, to permit the Defendant to receive the Profits during the Reſidue of the Term after the Death of the Child.

The Plaintiff, being Adminiſtrator to the Husband, prefers his Bill againſt the Truſtees, to compel them to aſſign to him. Whereupon it was held,

1. That this Leaſe being a Thing of ſmall Value, about 3 l. per Ann. and there appearing no Treaty of Marriage,

See 1. Chan. Cas. 17. 18. 1. Wms. 456. Co. Litt. 112. & my note 2. 6. there. See alſo 1. Ves. 23. Ambl. 467. 473. 3. Bro. Parl. Cas. 300. 1. Ves. 305. 306. 2. Ves. 191.

riage, nor any Contemplation of this Leaſe, nor any Agreement concerning it with the Husband, that the Aſſignment made to the Truſtees was not fraudulent againſt the Husband, but that he ſhould be bound by it, ſo as that the Child after the Death of the Wife ſhould hold it, and if ſhe had then limited it over, the Husband had been bound by it.

2. It was held that the Execution of this Power by the Wife after Marriage was void; and ſo the Plaintiff who was the Adminiſtrator of the Husband had the Decree; not but that a Feme Covert may in many Caſes execute a naked Power; but here this Power was coupled with an Intereſt, which Intereſt by the Marriage did veſt in the Husband; for the Reſidue of the Term being not diſpoſed of in the firſt Settlement, was a Truſt for the Wife, and by Conſequence was by Marriage a Truſt for the Husband, which the Wife could not diſpoſe of without him.

Poſt Caſe 214.

Baker *verſus* Orlibeare, a Barriſter of the Middle Temple.

(102)

Mr. Baron Atkins.

Forfeiture for Non-payment of Rent, the Tenant compelled to take a new Leaſe.

THE Plaintiff being Leſſee of a Houſe from the Company of Carpenters (in which there was a Clauſe of Forfeiture for Non-payment of Rent, and alſo for not Repairing within three Months after Notice) makes an Under-Leaſe to the Defendant; the Plaintiff's Leaſe being avoided by the ſaid Company for Non-payment of Rent, he took a new Leaſe, and then did requeſt the Defendant to take a new Leaſe from him, which the Defendant refuſing, the Plaintiff preferred his Bill, to compel him to take a new Leaſe, which was ſtrongly oppoſed by the Defendant's Counſel; for that although it was frequent that, where a Leſſor took Advantage of a Forfeiture, the Leſſee might compel him to grant a new Eſtate; yet it was never known that in that Caſe the Leſſor could compel the Tenant to take a new Leaſe. But it was anſwered, that Caſe is not like this; for there it was the Act of the Leſſor to avoid the Eſtate; but in this Caſe it is not the Act of the Leſſor (the Plaintiff) but of the Company, who are the Head Landlords; and although it may be occaſioned by the Default of the Plaintiff, viz. in not paying his Rent, yet there is a great Difference between an Act and a Default; for it would be very hard where the Head Landlord takes an Advantage of a Forfeiture by the Default of the

meſne Landlord, that all the Under-tenants ſhould be thereby diſcharged; and ſo it was decreed that the Defendant ſhould take a new Leaſe for ſo much of the Term as was unexpired, with the ſame Covenants as were in the old Leaſe. Poſt Caſe 128.

(103.)

Executor Confeſſeth Judgment, a Bill depending for Diſcovery of Aſſets.

MR. Solicitor cited a Caſe of Patrick and Dee, where an Executor pleaded Fully adminiſtred to an Action brought againſt him; whereupon the Plaintiff preferred his Bill in this Court for Diſcovery of Aſſets; and whilſt the Suit was depending in this Court the Executor confeſſed Judgment to another Perſon; this Court cauſed him to pay the whole Debt, for that the Party ſhould not ſuffer by an Act that was done to defraud him whilſt he was proceeding in this Court.

The Lord Paulett's Caſe. (104.)

Heir a vera benefit del Portion.

THE Lord Paulett in a Marriage Settlement raiſeth a Term of Five hundred Years in Truſt, that out of Profits, Leaſes, Sales or otherwiſe, the Truſtees ſhould raiſe 4000 l. apiece to younger Sons and Daughters, to be paid them at the Age of 21 Years, or their Marriage, or as he ſhould direct in his laſt Will and Teſtament; and after the Sums raiſed, the Term to merge in the Reverſion. At the Time of executing the Deed, his Will was drawn with the Bequeſts as aforeſaid, relating to the Truſt; one of the Children died before One and twenty Years unmarried, her Adminiſtrator demands the ſame, as the Chattels of the Party deceaſed.

The Court decreed, that it ſhould accrew to the Benefit of the Heir, out of whoſe Eſtate the Term was to be raiſed; giving Reaſons and making the Difference as follows:

Firſt that peruſing all Precedents offered, he found none that came up to this Caſe, making a great Difference between a Legacy and a Truſt; that if it had been a Legacy by Will, Legacies are governed by the Rules of the Law; but where Sums are to grow out of a Truſt of a Term, the Will of him that created the Truſt is to be obſerved; and although this was by Will, yet the Will and the Truſt relating to one another, and executed at the ſame Time, it ſhall be conſtrued upon the Truſt;

and the Truſt for ſuch Purpoſes being of a Term carved out of the Inheritance, it ſhall accrew to the Heir, being more reaſonable an Inheritance of an Heir ſhould be reſpected, than if it had been originally Goods and Chattels, ſo the Eſtate of an Executor; farther alledging that theſe Sort of Settlements, concerning moſt of the great Families of England, being made upon a Sort of a Condition, and the Conſideration of advancing the Younger Children of ſuch Families, the Condition and the Reaſon of the Advancement being prevented by Death, it was more Reaſon that it ſhould be for the Benefit of the Heir of the Family, out of whoſe Eſtate the Truſt was created, than that an Executor ſhould go away with ſuch Sums, that often is a Stranger to a Family; beſides it could not be intended that the Truſtees ſhould be charged with ſuch Sums preſently, when the Time of Payment is not aſſured, and only Maintenance aſſigned in the mean Time; in this Caſe the Money was not actually raiſed, and the Executors would compel them to raiſe it.

DE
Term. S. Trin.
1686.
In Curia Cancellariæ.

Earl of Winchelsea *versus* Norcliff & al'. (105.)

Lord Chancellor.

IN this Case these Questions did arise upon the Act for Distribution of Intestate Estates.

Distribution.

1. Whether the Grandmother should have an equal Share with the Brother or Sister? And it was said she should, because she is two Degrees from the Intestate, and so is a Brother or Sister, computing the Degrees according to the Civil or Canon Law, viz. one Degree to Father, another from him to the Brother, and so the Grandmother is but two Degrees, one to the Father, another to the Grandmother.

But the Lord Chancellor seemed clear, that the Grandmother should have no Share.

2. Whether a Brother of the half Blood should have an equal Share with a Brother of the whole Blood?

Post Case 124.

And per Cancellar', he shall not, but shall have only half a Share, and so he said it was held in the King's Bench; and since that there being a Cause in the Exchequer, where this Point being in Question, the Barons consulted with him, and he informed them of the Resolution in the King's Bench, and they ruled it accordingly in the Exchequer. Quære Whether it be not since resolved, that he shall have a whole Share.

3. The

3. The Intestate was an Infant; and the Father of the Intestate leaving a great Personal Estate to him, made Trustees, the Trustees purchased Lands for the Use of the Intestate, in Case he accepted thereof when he came to Age; and he dying before he came to Age, the Question was, Whether this was Personal Estate to be distributed, or whether the Lands should descend to the Heir?

And as to this Point, the Court was doubtful, but seemed to incline, that it should go to the Heir, and should not return to the Personal Estate; there appearing no Fraud in the Trustees, but that they had well executed their Trust; but of this the Court seemed more doubtful.

4. A Devise to the Heir, paying 300 l. to another Brother within the Space of three Years, and if he did not, that then the other Brother should have the Land; the Money is not paid; and the Question was, Whether the other Brother should have the Land? And the Lord Chancellor seemed to think that he should, because this is a Limitation over, and not like a Condition to redeem upon a Mortgage; but it was averred by the Practisers at the Bar, that it had been often Ruled in the Times of the Lord Nottingham and Bridgman, that this was but in the Nature of a Penalty to enforce the Payment of the Money, and though the Money was not paid at the Day, yet if the Party came afterwards and paid the Principal and Interest, that he should have the Land.

It was ordered, that all these Points should be stated into Cases, and then he would consider of them and give his Resolution.

(106.) Griffith *versus* Jones. *1. 1. 2. Ch. Rep. 394.*
See Forrester 251 & my references there.

Master of the Rolls, Trevor.

A Man made his Will, and gave several Legacies to several of his Relations, and after his Debts and Legacies paid, he gave the Surplus to his Brothers and Sisters Children and Grand-Children, and the rest of his poor Kindred, at the Discretion of his Executors.

Poor Kindred.

Two Questions. 1. How far the Words poor Kindred should extend? And for that, Resolved that it should carry one Degree farther than he had expressed, and no farther.

It was said, that of late it hath been held, that if a Man gives his Personal Estate amongst his Kindred, that the Devise should be governed by the Act of Distribution

of Intestates Estates; but this being a Will he said he would extend it one Degree farther than the Testator had expressed.

He held that the Children and Grandchildren, and the rest of the poor Children, should have equal Shares; and that the Executors should have no Power to give more to one than another, notwithstanding the Words at the Discretion of my Executors.

Cooke *versus* ——— See as to this case 14. Ves. (107.) Jun. 167.

Contribution.

THREE bound in a Bond, one being Principal and the other two Sureties; afterwards a fourth Man becomes bound to the Obligee, that if the other three did not pay according to the Condition of the Bonds, that he would pay; a Month after one of the two Sureties pays the Money, and prefers his Bill against the fourth now for Contribution; and the Question was, Whether he should be bound to contribute, his being but a supplemental Security? And the Master of the Rolls seemed to think that he should.

DE
Term. S. Trin.
1687.
In Curia Cancellariæ.

(108.)

Heywood *versus* Maunder & al'.

Lord Chancellor.

Truſt of a Term.

A Term for Years was aſſigned to Truſtees, in Truſt for the Husband for ſo many Years of the ſaid Term as he ſhould live, and afterwards for the Wife for ſo many Years as ſhe ſhould live, and after the Deceaſe of the Wife, in Truſt for ſuch of their Children as ſhould be then living, and their Iſſues; and for Default of ſuch Iſſue, in Truſt for the Plaintiff for the Reſidue of the ſaid Term, who brought his Bill to have the Truſt executed, the Husband and Wife being dead without Iſſue; wherein the ſole Queſtion was, Whether this Limitation of the Truſt of a Term, after dying without Iſſue, were good or not?

Per Cur': In this Caſe it is good enough, for although where the Truſt of a Term is limited to a Man and his Iſſue, it cannot be limited over, becauſe Iſſue may continue for ever, and the whole Term is ſunk in that Limitation; nay where the Truſt of a Term is limited after the Death of any one without Iſſue, it is not good, becauſe it would make a Perpetuity, and Iſſue may continue for ever; yet in this Caſe it being upon a Contingent, which muſt determine in a Life, it is good enough, the Contingent happening that no Iſſue was living; and that was

Ante Caſe 84.

the Reason they went upon in the Duke of Norfolk's Case; and decreed for the Plaintiff accordingly; and in this Case it was said, that Trusts of Terms for Years ought to be carried as far as the Rules of Law will possibly permit, being now become common Settlements upon Marriage, many Estates being held only by Terms for Years.

Guavers *versus* Fountain, in Scacc'. (109.)

Sequestration.

THE Question was, Whether the Court of Exchequer could grant a Sequestration after a Decree for a personal Duty?

It was admitted, that in Process for Appearance a Sequestration was always grantable by this Court, but for a Personal Duty after a Decree, there were many Instances in my Lord Chief Baron Hale's Time, and in the Lord Montague's Time, where it had been denied; and these Precedents, that had been produced for it, were most of them where it was the Suit of the King, which was admitted on all Hands, that where the King was Plaintiff it might be granted.

But by the Opinion of Baron Jenner, Heath and Powell, it ought to be granted; for they thought that if it might be granted in mesne Process, where it did not appear whether there was any Duty or not, a fortiori after a Decree, where the Duty was adjudged and ascertained.

And it being always the Practice of the Chancery, it ought much more in this Court, where the Plaintiff was supposed to be a Debtor to the King; and they thought that the Jurisdiction of the Court of Equity would be to little Purpose, if the Court had not sufficient Authority to see their Decrees executed.

The Lord Chief Baron doubted, because the Lord Chief Baron Hale could never be prevailed upon to grant it, nor the Lord Montague, to whose Learning he said he must greatly subscribe; but by the Opinion of the other three it was granted.

DE

DE Term. S. Mich.

1687.

In Curia Cancellariæ.

(110.)

Lord Chancellor.

Rent payable to the Administrator.

RENT of 60 l. being due to A. he died Intestate, leaving B. his Administrator; B. and the Tenant come to an Account, and the Tenant pays B. 29 l. and gives him a Note for 31 l. and then died Intestate. And the sole Question was, Whether the Administrator of B. or the Administrator de bonis non of A. should have this Rent? And it was ruled that the Administrator of B. should have it; for by taking a Note for it he had altered the Property so as to make it due to him in his own Right, unless there had been any Debts of the first Intestate unpaid, and then this Court would have made it liable to satisfy those Debts; and they seemed to be of Opinion, that if a Debt be due to the Intestate, and the Administrator takes a Security in his own Name, altho' the first Security be not delivered up, yet in Case the Debt be not paid, this will be reckoned as Assets come to his own Hands, and will make a Devastavit.

Devastavit.

And Finch cited a Case, adjudged in the House of Lords, where an Executor bringing Trover for Goods of the Testator, upon an Agreement the Executor took a Bond for the Value of the Goods; afterwards the Obligor became insolvent; and this was adjudged a Devastavit. But he said that Case differed from this, because there the Executor had made as it were an absolute Disposal and Sale of the Goods, and therefore took a Security at his Peril; but that differed from this Case, for notwithstanding this Note, an Action might be brought upon the Lease; but yet it was adjudged as aforesaid.

And it was held likewise, that where a Lessee makes an express Promise to pay Rent, or gives a Note for it, that an Action on the Case will lie upon the Note or the Promise. 1 Roll. 8.

Gay *versus* Wendow. (111.)

Lord Chancellor.

A Woman upon Marriage gives a private Bond.

THE Plaintiff, a Woman, who had 150l. given by her Brother, the Defendant, upon her Marriage, gives a Bond privately to her Brother to repay the said Money; the Husband being Dead without Issue, the Defendant sued the Bond at Law upon the Plaintiff; whereupon she preferred her Bill here to be relieved against it, being a Fraud by Reason it was done without the Privity of her Husband. It was urged for the Defendant, that it was good Reason for the Husband or any of his Issue to be relieved, in case they had been concerned, but that there was no Reason that the Woman her self, who gave the Bond, should be relieved.

But ordered that the Bond should be delivered up, for being once a Fraud no Accident of Death or Course of Time should alter the Case; and the Plaintiff was relieved notwithstanding it was her own Agreement, being done in Fraud of the Husband.

DE

Term. S. Trin.

1688.

In Curia Cancellariæ.

Lister & al' *versus* Lister.

(112.)

Lord Chancellor.

Baron and Feme.

THE Plaintiffs were Creditors to the Defendant's Husband, and preferred their Bill against the Defendant, and several Persons who were Debtors to the Defendant upon Bonds before her Marriage. And

The Case was, That the Defendant's Estate being about 500 l. consisted chiefly of Bond-Debts, and, in Consideration of this Portion, the Husband settled 50 l. per Ann. Jointure, and died soon after the Marriage, before the said Bonds were paid or altered, and the Wife enjoyed the Jointure; and not leaving Assets, his Creditors preferred this Bill.

Per Cur': The Bonds not being altered, the Law hath vested the Right to them in the Wife, and are not Assets of the Husband neither in Law nor Equity; and so the Bill was dismissed.

Arundel *versus* Philpott.

(113.)

Lord Chancellor.

Power of Revocation when executed.

A Settlement was made, with Power of Revocation by Deed sealed in the Presence of two Witnesses, and Tender of a Guinea to the Defendant; the Proof was,

that the Party who had this Power being in a Passion with the Defendant, high Words passed between them, and she told him she would undo the Settlement, and in her Anger threw a Guinea upon the Ground. Ante Case 72. Post Case 133.

Per Cur': This shall not amount to a Revocation in Equity; but if it had been proved that a Guinea had been deliberately tendered, and the Party had at the same Time declared, that she did it with an Intent to revoke the Settlement, although the Deed had never been sealed; or if the Deed had been sealed to revoke it, and no Guinea tendered; this Court would have supplied the Defect of one particular Circumstance, where it appeared that the Party did deliberately and advisedly intend the Thing; but what was said in a Passion the Court will not regard. Post Case 323.

DE

Term. S. Mich.

1688.

In Curia Cancellariæ.

Searle *versus* Lane. (114)

Lord Chancellor.

Decree for a Debt preferable to a Bond.

THE Plaintiff obtained a Decree in Chancery for 80 l. against the Defendant's Intestate, and thereupon brought a Sci' Fa' to revive the Decree against the Defendant. The Defendant pleaded that he had paid away all the Intestate's Estate, to satisfy Debts due upon Bond from the Intestate, before the Sci' Fa' brought, and before he had any Notice of this Decree

cree; and thereupon the Queſtion was, Whether this ſhould be a Devaſtavit in the Defendant, in paying Bond-Debts before this Decree? And this Point being argued by Keck and Pollexfen for the Defendant, and Finch for the Plaintiff, it was decreed for the Plaintiff, that a Decree in this Court for a Sum certain was equal to a Judgment at Law; and as an Executor ſhall be bound to take Notice of a Judgment at Law, although in an inferior Court of Record, ſo much more of a Decree in this Court, being a Court of a higher Authority and Juriſdiction; and thereupon decreed pro Quer'.

But if the Decree had been only to account, and had not aſcertained the Sum, it would have been no more than a Judgment quod computet at Law, which is no compleat Judgment till the Account ſtated.

This Caſe was reheard in Term. Paſchæ 1689 before the Lords Commiſſioners, who took Time to conſider of it. Quære how determined.

DE
Term. S. Trin.
1689.

In Curia Cancellariæ.

(115.)

Lords Commissioners.

A Man made his Will, and devised all the Residuum of his Personal Estate to J. S. and to his Wife, nevertheless in Trust for his Wife, and made the said J. S. and his Wife his Executors.

Executor has the Residue of the personal Estate.

After the making of this Will, and six Months before the Death of the Testator, the Wife died, and then the Testator died; and the next of Kin preferred a Bill against the Executor to have an Account of the Personal Estate, and insisted upon it, that J. S. was only a Trustee, and had no Benefit intended him by the Testator.

But per tot' Cur' the Bill was dismissed, for the Law had cast it upon J. S. by being Executor, and there appeared no Intent of the Testator that it should be otherwise.

Garberond *versus* Garberond, cited in Court. (116.)

Lords Commissioners.

J. S. deviseth that his Personal Estate should be divided amongst all his Grandchildren (or Children) and after the Devise, and before the Death of the Testator, another Child is born.

Devise to all his Children. Post Case 262.

Resolved, That Child shall have a Share.

DE
Term. S. Mich.
1689.
In Curia Cancellariæ.

(117.)

Lords Commissioners.

Long Possession.

Knight *versus* Adamson.

A Writ of Aiel was brought in the Court of a Copyhold Manor, to avoid an Estate, for that there had been no Surrender.

A Possession having gone with the Defendant there for 45 Years, the Court granted a perpetual Injunction, for that after so long Time a Surrender should be presumed, and the Rolls may be lost, and no Reason the Estate should be avoided after so long a Possession; and the Lord Keck cited the Case of Lyford and Gower, in the Lord Coventry's Time, where an Injunction was granted in the like Case; and the Case of Pigeon and Loveday, 11 Car. 1. where a Lease was attempted to be avoided for want of Livery, after a long Possession; Case of Rose and Trelawny, 35 Car. 2.

(118.)

Fraud upon a Purchaser.

A Bill was preferred by a Purchaser, to be relieved against a Fraud by giving a Particular of greater Value than the Land really was of; but the Bill was dismissed with Costs, because it was the Plaintiff's own Laches that he would not inform himself of the Value; and a

Case was cited by the Lord Keck, where a Purchaser brought his Bill to be relieved where Incumbrances were concealed, but was dismissed, for he ought to have provided against it by Covenants. But it was said by Rawlinson, that if the Purchaser had in that Case had Money in his Hands, that this Court would have helped him, but not after he had paid his Money.

And a Case was cited where a Man conveyed his Land by the Quantity of 100 Acres, be it more or less, and it was not above sixty Acres but had no Relief because it was his own Laches. *Ld Fitzh. Law of Vendors &c. 3. Ed. 225.*

Birkett *versus* Coward. (119.)

A Devise was made in these Words, I give to my Sister H. 300 l. upon Condition that she give Security to leave 100 l. apiece to her two Children, and 50 l. apiece to A. and B. Lords Commissioners. Legacy lost.

H. died before the Testator; and the Question was, Whether the Legacy was lost to the Children, one whereof was now Plaintiff?

It was argued by Finch, that the Construction of this Devise should be, that H. should have the Interest during her Life, and then the Children, and the Principal after her Decease; so that although she died, yet the Legacy should not be lost to the Children.

But per Cur': The Legacy is clearly lost, for it was to vest in H. first, and she was to secure the like Sum to the Children; and Finch admitted it to be against him.

Lower *versus* Weale. (120.)

THE Plaintiff's Father, Tenant in Tail, sold his Land to the Defendant, and made him a Conveyance, the Defendant taking him then to be Tenant in Fee; the Defendant afterwards finding that he was only Tenant in Tail, preferred his Bill to compel him to levy a Fine, and make further Assurance, and had a Decree accordingly, having paid his Purchase Money; and it was decreed that the Defendant should enjoy against the Vendor and his Issue, and all claiming under them; the Vendor lay in the Fleet, and would not make further Assurance, and died in Prison. Lords Commissioners. Upon a Bill of Review.

The

The Plaintiff, being Heir in Tail, brought his Bill of Review to reverse the said Decree, and assigned for Error that he being Heir in Tail ought not to be bound by it.

It was argued by the Attorney General and Mr. Finch for the Defendant, and by Serjeant Hutchins and Sir William Williams for the Plaintiff.

It was insisted for the Defendant that the Decree ought not to be reversed, but that the Plaintiff being Issue in Tail ought to be bound by it, because the Father in his Life-Time could have barred him by a Fine, and it was what in Equity he ought to have done, having received his Purchase Money; and that which carried it farther in this Case was, that there was a Decree and Judgment of the Court, that he ought to have done it.

It was admitted, that if Tenant in Tail contracts for the Purchase of his Estate, or makes a Conveyance thereof, and levies no Fine, that no Bill will lie against the Issue in Tail to compel him to convey; but here the Matter being Decreed against him in his Life-Time, whether the Issue should come in to avoid that Decree, it being a Decree which ought in Justice and Conscience to be performed?

1. Obj. The Issue in Tail claims paramount the Tenant in Tail per formam doni.

Ans. The Issue in Tail derives his Title through the Tenant in Tail, to convey himself to the Estate.

2. Obj. This Decree is to set aside the Statute de donis.

Ans. It is not so much to set aside that Statute, as it is to come in Aid of the Statute of Fines, which was made to bar Intails.

Besides, if this Decree should not bind the Estate, it would put it into the Power of the nocent Person to elude the Justice of this Court; for if he will lie in Prison and be obstinate, the Purchaser is cheated of his Money.

In many Cases the Act or Neglect of Tenant in Tail shall affect the Issue, although no Fine be levied; as in Case of a Forfeiture of the double Value, upon Marriage, the Estate shall be charged in the Hands of the Issue, although the Party dies.

But to that it was answered per Maynard, that is by Virtue of an Act of Parliament prior to the Statute de Donis, and then, according to a Rule in Law, a subsequent Statute doth not abrogate a precedent Statute, without express Words.

They cited Octavian Lombard's Case, but that differed from this, because the Issue in Tail there had a Benefit by the Act of his Ancestor, and so was bound by it.

Lands devised to a Man and the Heirs of his Body, and that the Devisee should grant a Rent in Fee; the Devisee grants accordingly; and adjudged that the Issue in Tail was bound by it.

But to that it was answered, that the Grantee there did not claim under Tenant in Tail, but from the Devisor. Bro. Feoffment to Uses.

This Court hath from Time to Time enlarged its Power to make its Decrees effectual; it was held all along until King James's Time, that the Decrees of this Court bound only the Person, and could not meddle with sequestring of Land; neither did the Court of Exchequer ever do it till of late; but finding their Decrees would be useless in many Cases where the Person was obstinate, it is now the Common Practice of both Courts.

It was doubted till of late, whether a Common Recovery suffered by a Cestuy que Trust in Tail should bar the Remainder Man. In a Case between Workman and Downing, the Lord Bridgman was very doubtful; but that Point is since settled in the Case of the Lord Chief Justice North, by the Opinion of the Lord Nottingham, that it would bar, for two Reasons.

1. Because a Trust is not within the Statute de Donis.

2. A Trust is a Creature of this Court, and so under the Control of it.

For the Plaintiff it was insisted, that the Issue in Tail was intitled, and did claim per formam Doni, and had an Act of Parliament for his Security, which could no Way be barred until the Act which gave Power to bar by a Fine, until the Way of a Common Recovery was found out, which was taken for a Bar because of the supposed Recompence.

It is often said here, that this Court should always be cautious of assuming a Legislative Power, to avoid an Act of Parliament; besides, if it should once be admitted, that the Issue in Tail should be otherwise barred than by a Fine or Recovery, there would be no Stop.

Obj. This is in the Case of an honest Purchaser, and so the Court ought to help as far as they can.

Ans. That may be said in all Cases where a Man pays Money, and every Creditor may say as much where his Debt is Real, and the Consequence of that would be

to let in all Judgments, Statutes and Mortgages upon the Estate-Tail. Curia advisare vult.

Hillier *versus* Hillier.

(121.)

Devise to dispose amongst Children as she should think fit.

A Devise was made in these Words, I give to my Daughter Hillier 1000 l. to be ordered and disposed by her and for the Benefit of her Children as she pleaseth, without giving an Account to any Body. Mrs. Hillier died and made no Disposal; the Defendant, her Husband, took Administration, and the Children, the Plaintiffs, brought their Bill for this 1000 l. And the sole Question was, Whether there was any Interest vested in the Children by this Devise? For if there was not, then it belonged to the Defendant, who was Husband and Administrator to the Wife; and it was insisted for him, that it being given to the Wife by the first Words of the Will, the Husband became intitled to it; and it was compared to a Case adjudged in this Court, where a Devise was made to the Wife, for her separate Use, and that the Husband should have nothing to do with it; notwithstanding these Negative Words, it was held that the Husband should have it, no Trustees being appointed, for as soon as it vested in her, the Law gave it to the Husband. But yet it was argued, that if a Devise be made to the Wife in Trust for another, though the Husband be intitled in Law, yet it shall be still subject to the Trust; and the Cases of Civill and Rich, 1 Rep. C. 141. and Gratte and Borrett were cited, where it hath been held, that a Man deviseth a Personal Estate to his Wife, to dispose amongst her Children as she should think fit, that it is not in her Power to make a great Inequality in the Disposal, unless there be some particular Reason for it, and it shall go in equal Shares amongst them.

Ante Case 16, 106.

But the Principal Cause was referred, and so the Court gave no Opinion, but seemed doubtful in the Case.

DE
Term. S. Hill.
1689.
In Curia Cancellariæ.

Wiſeman *verſus* Beake and Tyſon. (122.)

THE Plaintiff was intitled to a Remainder in Fee, after the Death of Sir William Wiſeman without Iſſue, and having Occaſion for 200l. borrowed it of the Defendant Beake, and gave a Judgment or Statute to pay 2000l. upon the Death of Sir William Wiſeman, without Iſſue, in the Year 1680. Lords Commiſſioners. Bargain unreaſonable.

In the Year 1683 the Defendant being informed, that a Court of Equity would interpoſe in this unreaſonable Bargain, by the Advice of Serjeant Philips, exhibited his Bill in this Court, that the Plaintiff might pay him his Money, or elſe that he might be concluded to be relieved.

The now Plaintiff then put in his Anſwer, and refuſed to pay the Money, but inſiſted upon his Bargain, and ſwore that he never would ſeek any Relief in a Court of Equity, and yet, Sir William Wiſeman being Dead without Iſſue, preferred his Bill to be relieved.

And here it was inſiſted upon, and admitted, that this is not in the Caſe of a young Heir, but the Plaintiff, at the Time when he made the Bargain, was at leaſt 40 Years of Age, and a Proctor at Doctors Commons, and therefore ſuppoſed to underſtand himſelf, and no Surpriſe proved, but the Bargain made at the Plaintiff's Inſtance; and there

there being a Bill and Anſwer, it was ſaid to have gone farther than any other Cauſe of this Kind.

But notwithſtanding the Court decreed, that upon the Plaintiff's Paying to the Defendant his Money and Intereſt, the Securities ſhould be delivered up; and the Bill and Anſwer was looked upon to be a Contrivance, which, if it ſhould once take, would be the Common Practice; and it was ſaid per Keck, as Fortifications of Fraud do increaſe, ſo the Courts of Equity muſt invent new Batteries againſt them; and Maynard was ſo much againſt theſe Bargains, that he was for giving only the Principal and no Intereſt; but the Practice having been otherwiſe, the Defendant had his Intereſt.

(123.)

Dyer *verſus* Tymewell.

Lords Commiſſioners.

Fraud.

THE Defendant being a Juſtice of Peace in the Weſt, when the Proſecution was there about Monmouth's Plot, by terrifying the Plaintiff that he was like to be proſecuted, got 50 l. out of him; whereupon the Plaintiff preferred his Bill here to be relieved, and the Court Decreed him the Payment of his Money back again.

(124.)

Croke *verſus* Watts.

S. C. 2 Vern. 124. Show. Parl. Cas. 105.

Lords Commiſſioners.

Diſtribution.

THE Queſtion was upon the Statute of Diſtributions, whether a Brother or Siſter of the Half Blood ſhould have an equal Share with the Brother or Siſter of the whole Blood; and ſeveral Cales were cited, as Modern Reports 209. 2 Jones 93. Smith's Caſe, Hill and Bird, Sty. Rep. Lady Butler's Caſe, that Adminiſtration ſhall go to the Reſiduary Legatee, becauſe the Statute of Adminiſtration is to ſupply the Will of the Inteſtate and to be conſtrued as near it as may be, and Glaſcock's Caſe was cited in Latch and Rolle, Tit. Prohibition, &c.

Ante Caſe 105.

But the Court were of Opinion according to the late Reſolutions, that the Half Blood was in æquali gradu, and ought to have a whole Share.

DE
Term. S. Mich.
1690.
In Curia Cancellariæ.

Goree *versus* Marsh. (125.)

Lords Commissioners. Heir and Executor. Creditor.

A. A Creditor by Judgment was paid by the Executor out of the Personal Assets, there not being sufficient to satisfy other Creditors, whereupon they prefer their Bill against A. and the Heir, either to compel A. to take his Satisfaction out of the Land, or else to have the Benefit of his Judgment, that they might be satisfied out of the Land.

And the Court seemed to incline that they would do it, rather than Debts should remain unpaid; for although at Law A. hath his Election to proceed for Satisfaction, either out of the Real or Personal Estate, yet he ought not to be Chancellor, so as to be under his Power whether the Debts should be paid or not, so long as he is not at any Prejudice, but must have a Satisfaction. And Hutchins said, as the Heir had many Times the Justice of the Court, for his Benefit, so he ought likewise to be subject to the Justice of the Court; and this being a Case for Payment of Debts, is stronger than in Case of Legacies; and he said it had been resolved, upon great Debate, that where there was Assets of the Personal Estate, and an Executor made, but not a Residuary Legatee, this Court, in Ease of the Heir, hath ordered a Debt chargeable upon the Heir to be satisfied out of the Personal Estate;

but in Case of an Administrator it was never doubted but they would do it in Ease of the Heir.

(126.) Heir *and* Administrator.

THE Lord Plymouth, being the Grantee of the Custody of a Lunatick, with the Rents and Profits received of the Estate purchased Lands; the Lunatick dying, the Question was between the Heir and the Administrator, who should have the Benefit of the Purchase?

Post Case 282. And the Court was of Opinion, that the Administrator should have it, and not the Heir; for if the Money had not been laid out, it had been clear that the Administrator should have had it; and if laying out the Money would alter the Case, then it would be in the Power of the Grantee of the Custody, to prefer the Heir or Administrator, as he pleased; and they said this Court may either follow the Land purchased, or the Estate of my Lord Plymouth.

It was admitted, that if an Estate be incumbered, the Guardian or Trustee of an Infant may with the Money raised out of the Estate clear the Incumbrances, and that will enure to the Benefit of the Heir, in Case the Infant dies; but that is not like this Case.

(127.) Peacock *versus* Spooner.

Lords Commissioners.

Trust of a Term. Ante Case 70. cont. 84. Post Case 283, 299, 303.

THE Trust of a Term for Years, upon a Marriage, was limited to A. the Husband for Life, then to B. the Wife for Life, and then to the Heirs of the Body of the Wife by the Husband to be begotten; † A. dies leaving Issue, B. marries a second Husband and dies, the Husband takes Administration; and the Question was, Whether the Husband should have the Term as Administrator to the Wife, or the Issue? And Resolved, That the Issue should have it; for, to support the Intent of the Settlement, they would take the Words Heirs of the Body to be Descriptio Personæ, and not Words of Limitation.

† see post. 232. where it is stated, that there was a limitation over in default of such issue.

Note, That this seems to carry the Trust of a Term farther than any other Judgment, and contrary to former Resolutions, but all the three Commissioners were of that Opinion.

Note, That after Hill. Term this Cause was heard upon an Appeal in the House of Lords, and the Appeal was dismissed, and the Decree confirmed.

DE
Term. S. Hill.
1690.
In Curia Cancellariæ.

(128.)

NOTE; It was said per Cur', and agreed, that where a Copyhold is devised, and no Surrender made to the Use of the Will, the Court will supply the Defect of a Surrender, in Case it be for Provision for a Child, but it is the Circumstances of the Case that induce the Court to do it, for they will not do it in all Cases. Copyhold not surrendred. Ante Case 75. Post Case 272, b.

As in a Forfeiture of a Lease by a Tenant for Non-payment of Rent, &c. and the Lessor enters, the Lease is avoided; it is a usual Equity for this Court to decree, upon Payment of Arrears, that the Lessor shall make a new Lease with like Covenants; but in some Cases it will not; as if there be any unreasonable Covenants, and the Party hath once legally discharged himself of them, this Court will not compel him to make the same Covenants again. Forfeiture and Entry. Ante Case 102.

(130.)

NOTE, That where a Mortgagor in Fee was bound in a Bond, and died, and the Heir sold the Equity of Redemption, it was held 1st, that the Equity of Redemption, since the Statute of Frauds and Perjuries, was Assets to a Bond-Creditor: And 2dly, that notwithstanding the Alienation, yet the Value should be Assets in the Hands of the Heir, come al moy fuit dit per Sir F. Winnington, il esteant de Concilio en le Case. Assets. 3 Keb. 307, cont.

Nota, Que per le Stat. 29 Car. 2. 3. The Trust of an Inheritance is Assets by the express Words of the Statute, and liable to a Debt by Bond.

(131.)
Will. New Publication.

A Man that had a Lease of a Dean and Chapter, all expired, except nine Months, deviseth all his Interest in the said Lease to B. and afterwards recovering renewed the Lease, and republished his Will; and the Question was, Whether this new Lease passed by the said Will? And Resolved that it did, by Virtue of the new Publication, and was like the Case of Brett and Rigden in Plow. concerning Lands purchased after the making of the Will, which passed by the Republication.

And the Lord Hutchins cited a Case, where a Man lying on his Death-Bed, and being asked where his Will was, pointed to a Box, and said, It is in that Box, and held this amounted to a new Publication.

(132.)

Chambers *versus* Cotchett.

Richard Chambers, the Father, by his Will gave to the Plaintiffs his Children 30l. apiece, and if either died before the Age of 21, his Share to go to the Survivors, and if all died before that Age, then their Portions to go to T. C. The Plaintiffs being Infants preferred their Bill by their next Friend for their Legacies. The Defendant who had married the Mother and Executrix, insisted that the Legacies ought not to be paid before the Age of 21, because it was ordered by the Will, that if either died before that Age, his Legacy should go over.

Ante Case 65.

Decreed, That the Legacies should be paid presently, and Interest from the Time of the Bill, and Guardian to give his own Security, that if either of the Legatees died, the Legacy should be applied according to the Direction of the Will.

DE
Term. S. Mich.
1691.
In Curia Cancellariæ.

Lady Vernon *versus* Jones & al'. (133.)

S.C. Rec. in Chanc. 32. 2. Vern. 241.
& 2. Wms 334. 335. 1. Bro. Cha. Ca. 401.

Lords Commissioners. Trevor, Rawlinson, Hutchins,

Revocation of a Will.

SIR Thomas Vernon of Shropshire, in Consideration that the Plaintiff, his Lady, had joined with him in a Fine, to take up Money upon a Mortgage of Part of his Estate, deviseth to her 200 l. per Ann. for her Life, and Portions to his younger Children, and chargeth the same upon his Estate.

After this Sir Thomas mortgageth his said Estate in Fee to Savile for 800 l. and after that by another Deed conveys all his Estate to Trustees and their Heirs, upon Trust to raise Money to pay his Debts, and the Surplus to his Right Heirs; and the Plaintiff preferring her Bill for her Annuity in Pursuance of the Will, the sole Question was, Whether the Mortgage in Fee and the Conveyance in Trust (being likewise of the Fee) or either of them, did amount to a Revocation of the Will? And all three Commissioners were of Opinion that, the Surplus being to his own Right Heirs, that was still in his own Power, and should be subject to his Disposal by the Will; and the Case of Hall and Dench was cited, where after a Devise of Lands the Devisor made a Mortgage in Fee, and adjudged that the Devisee should have the Equity of Redemption.

Post Case 277.

And Trevor said he always held it for a Rule in this Court, and never knew it fail, that a Conveyance should never operate farther than the Intent of the Parties at the making of it, and here is no Appearance of any Intent to revoke this Will. 1 Rep. Canc. 154. cont.

Mrs. Danby's Case was cited, where she joined with her Husband to levy a Fine, in order to the making of a Mortgage, and held that it should not bar her of her Dower.

And Finch said in Matters of Conveyance, the Intent of the Parties did govern much at Common Law, and cited a Case adjudged in the King's Bench, where there was a Power in a Conveyance to revoke by Deed; that a Covenant to levy a Fine, and a Fine levied in Pursuance thereof, was a good Execution of this Power, although the Deed of Covenants alone was no Revocation; neither was the Fine alone, because it was to be by Deed; and yet both together did amount to a Revocation and Declaration of new Uses; and so it is if a Fine be levied first, and a Deed to declare the Uses afterwards, this will be a good Execution of the Power, although a Fine alone would have been extinguish'd, yet the Law shall take both Deed and Fine together as one Conveyance, according to the Intent of the Parties. It was decreed for the Plaintiff.

(134.)

Lords Commissioners.

Copyhold.

A Copyhold is granted in Reversion after two Lives, Habend' post mortem, sursumreddicionem, &c. of the Tenants for Life; the Tenants for Life sell their Estate to A. and surrender to the Lord, to the End that he may admit A. the Vendee; the Copyholder in Reversion enters and brings an Ejectment, and recovers at Law; A. brings his Bill, and has Relief, because the Surrender being only to admit A. the Purchaser, it was against Conscience that the Reversioner should enter.

Mr. Bennett, Appellant *versus* Lord Salisbury, Respondent.

(135.)

Appeal to the House of Lords.

Ante Case 45, 98.

Bennett of Buckinghamshire by his Will gave to his two Daughters Twenty Thousand Pounds apiece, to be paid unto them at their respective Ages of Twenty-five or Days of Marriage, which should first happen, so as such

Marriage be had after the Age of sixteen, and with the Consent and Approbation of my Wife and my Cousin Lee; and if they shall marry otherwise, then to have only Ten thousand Pounds; and he devised the Residue of his Personal Estate to Trustees, to be laid out in the Purchase of Lands to be settled upon his Daughters for Life, Remainder to their Children, prout, &c.

Bennett the Testator dies, and the Lord Salisbury married one of the Daughters before the Age of sixteen, with the Consent of the Mother and Trustees; and Mr. Bennett the Appellant married the other Daughter.

The sole Question was, Whether the Lord Salisbury's Lady, by marrying before the Age of sixteen, had lost one Half of her Portion by the Construction upon his Will? And the Cause being heard in Chancery, the Lord Salisbury had a Decree for the Twenty thousand Pounds, and thereupon Mr. Bennett appealed.

For Mr. Bennett the Appellant, it was insisted,

That the Words of the Will were very plain that the Testator intended but Ten thousand Pounds, in Case the Marriage should be before sixteen.

That in this Case, here was no Forfeiture of the whole Portion, but only of Part; that here was a Devise over, (and then the Court of Equity could not interpose, as was held in the Case of Fry and Porter,) because the Surplus was appointed to be laid out and settled, and by Breach of the Condition the Ten thousand Pounds fell into the Surplus.

That in every Will the Testator is his own Chancellor, and if his Intent be apparent, a Court of Equity ought not to examine how reasonable it was for him to make such Will, because many Times Testators have Reasons to themselves which are not known.

For the Lord Salisbury it was insisted, that Forfeitures are odious in Law, and therefore shall be taken strictly.

That Conditions to restrain Marriage are absolutely void by the Civil Law.

That a Condition not to marry without the Consent of A. and B. is likewise void by that Law, in as much as it is put in the Power of others whether the Party shall marry or not.

That the Testator could intend no more, than that his Daughter should not marry improvidently; and here it was agreed on all Hands to be a good Match both as to Quality and Estate; and it was in Proof, that the Testator

ſtator himſelf was in Treaty for this Match, whilſt his Daughter was under ſixteen.

That the very Words of the Will might be ſatisfied, and yet no Forfeiture, for the Word otherwiſe ſhould refer to the next Antecedent, which was the Truſtees Conſent, and that ſhe had, and beſides, here ſhe living till after ſixteen, may be ſaid to be married after ſixteen.

And they cited the Lady Bellaſis's Caſe, concerning a Deviſe of Eight thouſand Pounds, in 15 Car. 2. adjudged by the Lord Clarendon, aſſiſted with Hales and Keeling, where ſuch a Condition was agreed to be only in Terrorem; and the Decree was affirmed.

DE

Term. Paſchæ

1692.

In Curia Cancellariæ.

Hungerford *verſus* Earle & al'.

(136.)

Fraud.

ROGERS mortgaged Lands, and in 1655 he and the Mortgagee convey'd to the Defendant upon Truſt to pay the Debts mentioned in the Schedule, and afterwards for Proviſion for himſelf and his Children, and the Surplus to the Heir; in 1667 he became bound in a Bond to the Plaintiff, and the Plaintiff preferred his Bill to be let into this Eſtate to be ſatisfied his Debt.

It was insisted for the Plaintiff, that this was a fraudulent Deed, there being a Power of Revocation in the Deed. But to that it was answered, that it was not a general Power, but by Consent of Trustees, which did not make it Fraud within the Statute; and so it was said by Trevor, a Power to revoke for a particular Purpose would not make a Deed fraudulent. Power of Revocation.

It was alledged for the Plaintiff, that this Deed was only for Payment of Part of his Debts, Part being omitted out of the Schedule.

If a Man made a Settlement for Payment of his own proper Debts, and not to be liable to the Payment of such Debts where he is only a Security, it was doubted per Curiam, whether this would make the Deed Fraudulent or not; but the Court inclined that it would, because it may be the Credit of the Security is that which occasions the Lending of the Money; and Trevor said he once attended my Lord Bridgman upon such a Settlement of his own Drawing, where such Debts, for which the Party was only a Surety, were excepted, but my Lord Bridgman ordered the Party to pay that Debt.

Hutchins cited two Cases, where Land was Devised for Payment of Debts and Legacies, that the Debts should have the Preference, and that they should not be paid in Proportion; and in one of the Cases a Decree for Payment in Proportion by Bridgman, was afterwards reversed by Nottingham, and the Debts ordered first to be paid. Trust to pay Debts and Legacies. Ante Case 339.

Duchess of Albemarle *versus* The Earl of Bath. (137.)

1. l. 3. Cha. Ca. 55. Hard. 193. 2. Ch. Rep. 217.

THE Duke of Albemarle having made his Will in 1675; makes a Settlement by Deed in 1681, wherein he settled great Part of his Estate upon the Defendant, with a Power of Revocation by Deed or Will, to be executed in the Presence of six Witnesses, three whereof to be Peers, and upon Tender of 6 d. Afterwards in 1687 he makes his Will, testified by six Witnesses, but none of them a Peer, and gives his Estate to one Mr. Monk, and no Tender was made of the 6 d. Power of Revocation executed. Ante Case 68, 113. Post Case 271.

In this Case it was agreed, that this was not a legal Revocation, because the Circumstances were not pursued according to the Power, there being no Peers Witnesses to the last Will, nor any Tender made of the 6 d. so the only Question was, Whether the Court of Chancery should Ante Case 72.

ſupply this Defect, to eſtabliſh the laſt Will, as it was ſaid in ſome Caſes it had done; and the Caſe of Arundell and Philpot, and ſeveral other Caſes to that Effect were cited.

And this Rule was laid down, and ſeemed to be agreed viz.

That where there are two Conveyances to two ſeveral Perſons which are merely voluntary, there this Court ſhall not ſupply any Defect in the Execution of either of the Conveyances, or of any Power, and there he that hath the firſt Deed hath the better Right.

But this Court will oftentimes, in Caſe of a Purchaſer or a Creditor, or for a Proviſion for a younger Child, ſupply the want of Livery or Attornment or Surrender, in Caſe of a Deviſe of a Copyhold; and ſo likewiſe in Caſe of the Execution of a Power of Revocation, where all Circumſtances are not exactly perform'd.

See Campbell v. Leach Ambl. 740. & Coventry v. Coventry at the end of Prec. Ch. Making use of this in other books.

And though it was alledged that the Law had been very favourable in the Conſtruction of the Execution of thoſe Powers; as a Power to revoke by Deed, where a Fine was levied, and a Deed ſealed afterwards to lead the Uſes, adjudged a good Revocation, though the Fine it ſelf had extinguiſhed the Power, yet both ſhall be taken together for one Conveyance.

And it was ſaid, that the Circumſtances of Revocation ought to be purſued, or otherwiſe it would not be good, altho' the Law hath ſometimes been favourable in expounding where they are purſued; as where a Man reſerved a Power to revoke by expreſs Words, by Deed or Will, and made his Will and deviſed the Land, this was conſtrued a Revocation by expreſs Words; ſo in the Caſe of Williams there was a Deed, though the Fine was firſt levied, ſo it was revoked by Deed.

In the Principal Caſe, the Court delivered no Opinion, becauſe other Points were to be debated, but inclined that they could not ſupply the Defects of the Execution of this Power. Adjournatur. Afterwards the Court delivered their Opinion for the Lord of Bath, that the Deed was not revoked. Poſt Caſe 271.

(138.)

HELD by the Lords Commissioners, that if a Copyholder purchase a Copyhold for three Lives, and put in his own Life and two others, Habend' successive secundum consuetudinem Manerii, if the first Taker paid the Money, the other two are but in the Nature of Trustees for him, and he may dispose of the Estate in Equity, although it be in a Manor where there is no Custom for the first Taker to dispose, unless it shall appear that the other two Lives were put in upon some Consideration, or in Pursuance of some Agreement, &c.

Lords Commissioners. Trust.

See acc. 1 Vern. 415. 1 Eq. Ca. 385. See also Post Case 300. *& Mitf. 151.*

If a Man makes a Conveyance to A. in Consideration of Money paid by B. A. is but a Trustee for B. by Virtue of this resulting Trust, notwithstanding the Statute of Frauds and Perjuries, although no Trust be declared in Writing.

See post. 229.

It was said by Hutchins that above twenty Years since, this Court would not execute an Agreement for a Copyhold made without the Privity of the Lord, because he was concerned to accept the Surrender and admit. But about 20 Years since, that Difference between a Copyhold and Freehold was laugh'd out of the Court.

Sanders *versus* Deligne and Barns. (139.)

THE Plaintiff had taken a Mortgage for 500 Years of one, whom afterwards he discovered to be but Tenant for Life, and hearing that there was an Estate in J. S. in Trust for Infants, gets a Conveyance of this Estate, to protect his Mortgage, the Mortgagor being Dead; and the Question was, Whether he could do it by Virtue of this Conveyance, he having no Notice of this Trust when he lent the Money; or whether he should not for this Estate be a Trustee for the Children?

Lords Commissioners. Purchaser without Notice. Upon a Bill to Foreclose.

Hutchins: It is a settled Rule of this Court, that whoever takes an Estate clogged with a Trust for Children, presently becomes a Trustee for those Children.

Trevor and Rawlinson doubted, and cited Sir John Fag's Case, where a Purchaser got a Deed of Intail into his Hands, whether he doth it by Power or otherwise, if he had no Notice of it when he made the Purchase, he shall not be bound to discover it. A Case was cited where a Man got a Ladder and fetched a Deed out of a Window, and

and yet was not bound to diſcover it to impeach his Title: And Culpeper's Caſe was cited, where a Man had bought Gavelkind Land of the eldeſt Son, and paid his Purchaſe Money, without Knowledge that it was Gavelkind, and afterwards for a Song bought in the Titles of the younger Brothers, who were ignorant of their Titles, yet could not be relieved afterwards in this Court; the Purchaſer, having honeſtly paid his Money without Notice, may uſe what means he can to fortify his Title.

Trevor: If we do not ſet aſide his Deed, or ſubject it to the Truſt, yet we ought not to aſſiſt him in any Thing, and ſo not to decree any Foreclosure in this Caſe; but if he hath got a Title at Law, let him make the beſt of it he can at Law, but he ſhall have no Aid of this Court.

(140.) Colcheſter *verſus* Lord Stamford, Lady Suffolk.

Legacy chargeable upon Real and Perſonal Eſtate.

IF a Legacy of 500 l. be given to A. chargeable upon the Real and Perſonal Eſtate, and another Legacy of 500 l. to B. chargeable upon the Perſonal Eſtate only, and the Perſonal be only 500 l. in this Caſe A. ſhall not have any Thing out of the Perſonal Eſtate, but ſhall be wholly ſatisfied out of the Real Eſtate; for although where there is a Debt by Judgment or Statute, which chargeth the Real Eſtate, there this Court cannot hinder the Creditor's coming upon the Perſonal Eſtate, becauſe he hath Right ſo to do by Law, and it is not in the Teſtator's Power to take that Right away; but there the other Creditors have an Equity to charge the Real Eſtate for ſo much as is taken out of the Perſonal Eſtate, and may prefer a Bill for that Purpoſe; but in the Caſe of Legatees the Party ſhall not be ſent round about, but the Legatee, who has a Charge upon the Real Eſtate, muſt take his Satisfaction there, and ſhall not come upon the Perſonal Eſtate.

And per Trevor, If a Man hath two Daughters, and deviſeth to one 1000 l. out of his Real Eſtate, and to another 1000 l. out of his Perſonal Eſtate, there if the Real Eſtate be evicted, that Legacy is loſt, and ſhall never come into an Average with the other upon the Perſonal Eſtate.

Lowe & al' *versus* Baker, Roll and Clutterbocke. (141.)
27 May 17 Car. 2.

PER Loꝛd Chancelloꝛ, with Advice of the Judges, an Injunction doth not lie to ſtop a Suit at Leghorn oꝛ any other Foꝛeign Parts. Injunction to Leghorn.

Hide *verſus* Petit. Mich. 1667. (142.)
S. C. 1. Cha. Cas. 91. & post 133.

FOuntain, in Maintenance of the Juriſdiction of Chancery to grant Sequeſtrations on the Real and Perſonal Eſtate, foꝛ Bꝛeach of a Decree foꝛ a Perſonal Duty, urged Sacheverill verſus Sacheverill in King James's Time. The contrary Side admitted it well, in caſe the Defendant had gone beyond Sea; ſo if he will abſolutely lie in Pꝛiſon. Loꝛd Keeper hinted, that a Court Baron in a Judgment in Deceit, did ſequeſter the Pꝛofits of the Real Eſtate by a Judgment in Debt; the Mayoꝛ of the Staple may do it; theꝛefoꝛe it is reaſonable the High Court of Chancery may do it. Fountain alledged that it always had been done, and ſo was the Law of the Court, which is conſequently the Law of the Nation; the Common Law did not attach the Bodies foꝛ Perſonal Duties, yet Attachments oꝛ Subpœnas had been always allowed as the Pꝛoceſs in Chancery; and in Chancery there hath been Account againſt Executoꝛs Time out of Mind, though not by the Common Law oꝛ Statute Law at this Day; but Fountain would not defend the Sequeſtration of Choſes in Action, oꝛ on Copyhold Eſtate, which was in Queſtion, being on a Motion to diſcharge ſuch Sequeſtration foꝛ a Perſonal Duty. Lord Keeper, Baron Turner. Sequeſtration, of what. Poſt Caſe 162. Account againſt Executors.

Serjeant Fountain ſaid, he knew ſeveral Bills to be relieved againſt general Securities by Statutes, by giving Securities on particular Lands.

Tilley *verſus* Egerton. 27 Oct. 12 Car. 2. (143.)

NIc. Tilley the Plaintiff's Bꝛother, being ſeiſed in Fee of a Meſſuage, &c. in the County of Southampton, by Deed in 42 moꝛtgaged to Egerton in Fee foꝛ Security Lord Chancellor, J. Bridgman. Mortgage-Money. Heir. Executor.

Ante Case 17. Post Case 144.

of 150l. with Interest; afterwards in the Presence of Egerton, the Plaintiff purchased the Premisses of Nic. Tilley, and paid him Part of the Purchase Money in Hand, and gave him Security for the Residue; afterwards in 1651, the Plaintiff did agree with Egerton, for the Redemption and Purchase of the Premisses, and that in Satisfaction thereof the Plaintiff should pay 6l. for ten Years, and then 120l. at the ten Years End, the Premisses to be conveyed to the Plaintiff, and the Deeds to be delivered up to him; and upon the said Agreement, the Deed of Mortgage and other Deeds to be delivered up, by the Consent of the Plaintiff and Jo. Egerton, to Jo. Collier, an Attorney, to draw the Agreement into Writing, to the End it might be sealed by the Plaintiff and Jo. Egerton, but before that could be done, Jo. Egerton in 1653 died, leaving the Defendant Egerton his Heir; and Julian Egerton, his Wife, the other Defendant, took out Letters of Administration; the Heir and Administratrix contested in their Answers, who should have the Money, the Bill being for an Interpleader; and it was decreed for the Heir. Vide St. John, Executor of Grobham, against Wareham, the same Point decreed 16 Martii 11 Car. 1.

Interpleader.

(144.) Owen *versus* White & al'. 6 Nov. 1667.

Lord Keeper Bridgman, J. Morton.

Mortgage-Money. Heir. Executor. Interpleader. Ante Case 11, 17, 143.

THE Bill was preferred by the Mortgagor against the Heir of the Mortgagee in Fee and his Executors, praying that they might interplead who should have the Money; the Mortgagee had devised all his Mortgages to the Executor; therefore the Court decreed the whole Money to the Executors; the Counsel insisted that the Heir ought to have Part, for that the Mortgagee had not given all his Fee away, for the Words for ever were wanting, nor any Words of the Heir or Heirs of the Executor; but decreed ut supra.

(145.) Mr. Ottoway's Case. 10 Nov. 1667.

Injunction against a Parliament Man.

LORD Keeper granted an Injunction, for want of an Answer, against a Parliament Man, but ordered no Attachment should be taken out.

(145. b)

HE denied to grant an Injunction to quiet the Poſſeſſion of an Office, though Affidavit was made that the Party was in Poſſeſſion three Years peaceably before the Plaintiff's Bill exhibited. Injunction to quiet Poſſeſſion.

Barker *verſus* Kellet. Trin. 1667. (146.)

THE Bill was preferred by the Plaintiff, as Heir to the Mortgagor, to have Redemption againſt Mr. Kellet, who was Aſſignee of the Mortgagee, and to know what he paid for the Aſſignment, and on Payment of the Money Mr. Kellet paid for the Aſſignment, to have a Reconveyance. Kellet demurred to that Part which required him to ſet forth what he paid for the Aſſignment, and becauſe the Bill had not made the firſt Mortgagees Parties; and ruled a good Demurrer, for that he ſhould not diſcover what he paid on the Aſſignment; and if the Plaintiff will redeem, he ſhall pay what was due upon the Original Mortgage. Lord Bridgeman. Redemption from the Aſſignee of a Mortgage. Poſt Caſe 297.

(147.)

IF an Infant ſuffer a Decree by Conſent it is for ever reverſible, otherwiſe of an adverſary Bill. Infant.

Windham *verſus* Windham. (148.)

1. C. 3. Cha. Rep. 22.

DEcree by Conſent, for a Leaſe or other Perſonal Eſtate, ſhall bind Purchaſers, otherwiſe ſaid the Lord Keeper you will blow up the Court of Chancery. Lord Keeper, J. Twiſden.

(149.)

IN Original Bills or Bill of Revivor, if the Defendant hath not appeared, but ſtands out all Proceſs of Contempt, the Bill ſhall not be taken pro Confeſſo, but this only when the Defendant hath appeared, and ſtands out all Proceſs for want of an Anſwer. Bill pro Confeſſo.

(150.)

BILL for Payment of Money upon a Bond muſt be againſt all the Obligors, or elſe he can have no Decree, and in this Æquitas non ſequitur legem. All the Obligors.

Ma-

(151.) Truſt preſumed. Ante Caſe 36. Poſt Caſe 216.

MAſter of the Rolls ſaid, if the Father purchaſeth Land in the Name of the Son, a young Infant, it ſhall not be preſumed a Truſt.

(152.) Forfeiture ſet forth by Anſwer.

PLaintiff preferred a Bill againſt a Legatee, for that ſhe marrying without Conſent, the Deviſor limited to the Plaintiff. The Defendant demurred, for that ſhe ſhall not be forced to ſet forth her own Forfeiture.

(153.) Examination upon Interrogatories.

SUbpœna in Nature of a Sci' Fa' to revive a Decree; the Defendant doth not anſwer, but is examined upon Interrogatories to clear his contempt.

(154.)

PArol Agreement with 20s. paid for the Sale of a Houſe, was decreed without farther Execution proved, and the Maſter of the Rolls ſaid, he ſhould have demurred on the Bill, but having now proceeded to Proof he would decree it, and did.

(155.) Seymer *verſus* Noſworthy. Hill. 1670.

Lord Bridgeman.

Plea of a Purchaſer upon a Valuable Conſideration. Ante Caſe 25, 47.

DEfendant pleaded himſelf a Purchaſer for a valuable Conſideration; but ruled no good Plea, in regard he did not plead himſelf a Purchaſer from ſome of the Plaintiff's Anceſtors; for a Purchaſe from a Stranger without Title, was held no good Plea, and therefore the Defendant was ordered to anſwer.

Hill. Vacation 1674 being the ſecond Seal before Eaſter Term, on Motion by Mr. Noſworthy, the Plea was held good by the Lord Keeper Finch, and all the ſubſequent Proceedings ſet aſide.

Cocker & ux' & al' *versus* Bevis. 23 January 16 Car. 2. (156.)

THE Defendant had an Annuity of 100l. per Ann. granted by the Plaintiff's Father in this Manner; A Lease was made by the Plaintiff's Father to Bevis the Defendant for 99 Years, and Bevis leases back for 98, rendring 100 l. per Ann. and if the Rent were behind, Bevis to enter and satisfy himself; Bevis re-enters to satisfy, and the Heir desires an Account, and offers the Arrears; they come to an Account, which was stated by a Master in this Court, and then by Consent they come to this Decree, that the Arrears should be paid by such a Day, otherwise the Defendant to keep the Land; the Plaintiff paid 200 l. being Part of the Arrears at the Day appointed, but being a Colonel in the King's Army at Worcester, was not able to pay the Rest, but was forced beyond Sea; and now the Plaintiff desired an Account, and that on Payment he might redeem.

Decree by Consent, in Nature of a Mortgage.

Necessity.

Obj. That the Decree by Non-payment of the Residue was become absolute. But it was answered and Resolved, That this being by Agreement and Consent, the Decree was but in the Nature of a Mortgage, and the Agreement was executed in Part by Payment of 200 l. and then the other Part being hindered in Payment by an inevitable Necessity, the Plaintiff should be admitted to redeem, and the Defendant to reconvey to the Plaintiff or whom he should appoint, free from all Incumbrances by the Defendant, &c.

King's Attorney *versus* Sir George Sands. In Scac. Pasch. 21 Car. 2. (157.)

[Note that 3. Cha. Rep. 33. & Nels. Chanc. 130. reports this very case in the same words as here.]

SIR Ralph Freeman purchased a Lease for Years of several Manors; afterwards he purchased the Inheritance thereof, in the Name of Sir George Sands, being his Son in Law, in Trust for Sir Ralph and his Heirs; afterwards Sir Ralph made his Will, and made Mr. Freeman his Executor, and appointed that his said Executor and Sir George Sands should convey Part to Freeman Sands and Part to George Sands, the two Sons of Sir George

1. l. Hardr. 488. 1. Sid. 403. 1. Hal. P. C. 249. Nels. Ch. Rep. 130. See Ch. 14. Part. 144. 1. Blackst. Rep. 123.

Sands, and their Heirs, the Residue to all the Sons of Sir George Sands, by his then Lady (Sir Ralph's Daughter) and their Heirs, who should be living at the Time of his Death, and then died. Sir George Sands at the Time of the Death of Sir Ralph had only Freeman Sands (who soon after died without Issue) and the said George Sands; but afterwards Sir George had Issue another Son, called Freeman Sands. Mr. Freeman the Executor refused the Executorship, whereupon Administration was granted to Sir George Sands; afterwards, no Conveyance being made either of the Lease or of the Reversion by Sir George Sands, who had both in Trust, according to the Will, Freeman Sands killed George his Brother, and was afterwards attainted of Murder.

The Question was, Whether any of those Trusts, either of the Lease or of the Reversion, that were so in Sir George in Trust as aforesaid, were forfeited to the King, of whom the Lands were holden, by this Felony and Attainder; who by the King's Attorney sued Sir George on the Equity Side of the Exchequer, to answer the Profits to the King, supposing those Trusts to be forfeited by the Felony and Attainder.

The Case was several Times argued at the Bar, and this Term Chief Baron Hale and Baron Turner (Rainsford being removed into the King's Bench, and Atkins disabled by Age) both agreed that this Trust was not forfeited.

Trust forfeited to the King.

In their Arguments it was agreed, that Cestuy que Trust in Fee or Fee Tail forfeit the same by Attainder of Treason, and the Estate to be executed to the King in a Court of Equity, by 27 H. 8. 10. and 33 H. 8.

Alien Cestuy que Trust.

2. An Alien Cestuy que Trust of any Estate, the Estate belongs to the King; which the Chief Baron said was the Opinion of the Judges in Holland's Case 23 Car. 1. and that an Alien cannot purchase but for the King's Use, and that he was of Counsel in the Case. See the Case reported in Style 20, 40.

Trusts liable to the King's Debt.

3. As to the King's Debt, by the Common Law and by the Practice of this Court, which is of the Common Law, Cestuy que Trust being indebted to the King, the King shall have Execution of his Debt on this Trust, for before the Statute made 4 H. 7. 17 and 19 H. 7 5. in the Time of H. 6. there be Precedents in this Court, that the Writ of Extendi fac. for the Levying of the King's Debt, was of the Debtor's Land, or of any other Land of which any other Person was seised to his Use; and this was the Reason

of Sir Edward Cooke's Case, where the Interest of the King's Debt did attach upon the Power of the King's Debtor to revoke a Settlement made of his Estate; and Pasch. 4 Jac. Ford's Security taken in Trust for a Recusant was liable to the King's Debt of 20 l. per North, so that where the King's Debtor hath the profitable Part of the Estate, the King shall not lose his Debt by any Fiction.

4. It was agreed that the Trust of the Reversion would not be forfeited for Felony; which the Court held clear, and cited for Authorities, 3 Co. Marquis of Winchester's Case, 12 Co. 1, 2. 5 Ed. 4. 7. 2 Cro. 513. Stat. 33 H. 8. And if the Inheritance be forfeited for Felony, it must be to the Lord by Escheat, which cannot be, because he hath Cestuy que Estate for his Tenant, and that no Trust of an Heir is forfeited for Felony appears by 27 H. 8. 10. and there is no Wrong to the Lord as long as he hath a Tenant, and therefore till the Statute of 19 H. 7, 15. the Lord could not seise the Lands of which his Villein was Cestuy que Trust; and if it be demanded what shall become of his Trust, as if Tenant in Fee of a Rent-Charge dieth without Heir, it is answered the Land shall be discharged of this Trust, as if Tenant in Fee of a Rent-Charge die without Heir, or be attainted, the Land is discharged.

Trust of Inheritance not forfeited for Felony.

Trust of a Lease for Years in Gross may be forfeited by Felony, or Outlawry in a Personal Action. Earl of Somerset's Case. Hob. Dacomb's Case, 2 Cro. Balington's Case.

Trust of a Lease.

Lease for Years, if it be of never so long Continuance, if it be assigned in Trust for J. S. and his Heirs, yet it shall go to his Executors; yet Trusts are ruled according to the Stile and Course of Courts of Equity.

Lease for Years. Ante Case 70.

A Real Chattel in Law survives to the Husband, but not the Trust of a Real Chattel. Co. Lit. Cap. Remit. 351.

A Real Chattel. Ante Case 86. Post Case 174.

Cestuy que Trust of an Inheritance binds himself and his Heirs in a Bond, this Trust is not Assets to the Heir; though it hath since been Questioned in the Lord Chancellor Hyde's Time; but clearly the Trust of a Lease for Years is Assets to charge an Executor in Equity.

Trust Assets. Post Case 177.

So a Trust assigned over to wait upon the Inheritance, though of a Term, shall go to the Heirs and Heirs of the Body, because a Shadow kept on Foot for a special Purpose; and this hath a great Resemblance to the Case of Charters, which go with the Inheritance to the Heir, but if granted over, the Parchment and Wax shall go to the Grantee and his Executors. 4 H. 7. 10.

Trust to wait on the Inheritance. Ante Case 77. Post Case 212, 243. Charters.

And

And in the present Case, no Trust of the Chattel is forfeited to the King, because the Lease for Years was not in Freeman who was attainted of Felony, nor the Trust in him as a Chattel, for that he must have been Executor and Administrator of George the Son.

And here it was Sir Ralph's Intent, that the Lease and Inheritance should be confounded, and not kept separate; and again, Freeman could have this Trust but as Heir to George, and as long as he hath the Inheritance in him, and no longer, but it shall go to the Heir as Charters, Nomine pœnæ, Patronage by Foundership, &c. and the Mischief otherwise would be great, to have such waiting Terms forfeited by Outlawry. And so Judgment was given against the King's Attorney.

Waiting Term not forfeited by Outlawry.

(158.) Dr. Pery's Case.

Privilege. Convocation.

HE had his Privilege allowed in a Suit depending in Chancery, as a Member of the Convocation, the same with Privilege of Parliament.

(159.) Nurse *versus* Guillem. Mich. 1669.

Lord Bridgeman.

NURSE was examined as a Witness, though Plaintiff, to prove Service of a Decree; and on Debate the Deposition allowed; and ruled that the Plaintiff's Oath was sufficient to convict the Defendant of a Contempt, unless the Defendant swear quite contrary, and on Exception to a Master's Report, the Defendant was found in Contempt.

Proof of Contempt by the Plaintiff.

(160.) Hill. 21, 22 Car. 2.

Lord Bridgeman.

BACCHUS being Purchaser exhibited a Bill of Revivor against the Defendant, and revived the Suit by Oyer, and the Defendant joined in examining Witnesses, but at the Hearing the Plaintiff was dismissed, for that the Plaintiff as Purchaser could not maintain a Bill of Revivor.

Revivor by Purchaser. Ch. Rep. 174.

Depositions in a void Suit.

And it was now moved, that in an Original Bill exhibited by Bacchus he might use the Depositions taken in the Cause of Revivor; but the Court denied it, because

in Truth there was never any Bill depending in it, for the Bill of Revivor brought by a Purchaser was void, and the Depositions therefore taken on no Issue, and no Bill and Answer depending, and consequently no Indictment could lie against the Witnesses if perjured.

Per Amhurst: Adjudged in the Time of the late Commissioners, that where Baron and Feme in Right of the Feme exhibit a Bill, and the Baron dies, the Wife may proceed in a by Bill of Revivor, therefore Dy. Pery's Wife went on, though her Husband was Dead. Baron and Feme. Revivor.

Dalbin *versus* Prettiman. (161.)

LANDS devised for Payment of Debts; the Master of the Rolls would not allow any Interest for Shop Debts of 12 Years standing, because he said Tradesmen selling on Tick, sold at a Rate accordingly. Interest for Shop Debts.

Hide *versus* Petit. Oct. 25, 1670. (162.)

S.C. ant. 123. & D. Nottingh. Mss. Bolegom. of Equity ch. 26. pl. 10.

THIS Cause had been many Years depending in Court; decreed upon Appeal to Parliament by Petit, sent back to be reheard; upon hearing again referred to Account before a Master; upon hearing Exceptions to the Master's Report; an Order was made by Consent of both Parties, to stand to the Award of A. and B. Jolleis, two eminent Merchants; they several Times attended the Jolleis; Petit perceiving that the Jolleis would condemn him by their Award in 400 l. before the Arbitrators had drawn up their Award, Petit by Deed under Hand and Seal revokes the Authority given to the Arbitrators, and retracts the Submission; however the Arbitrators make their Award. And upon Debate it was held, that the Award ought not to be decreed, in Regard of the said Revocation, but the Court awarded an Attachment against Petit, unless he shewed Cause. And the Judges went on this Reason,

1. That an Authority in its Nature is revocable by Law, though referred by Order of Court; and a Case cited between Norton and Rolls in the very Point, where the Award was to have been made by Sir Mund. Brampton. Lord Keeper, J. Rainsford, Ba. Windham. Award by Consent. Ante Case 142. Authority revoked. Award. Exception.

2. This Award could not be decreed, because some Matters referred were not determined by the Award, and so not Final, and Cases cited, Ward versus Sawer, Child versus Colwell, and 13 Car. Mayer's Case, where by Order of Court, the Submission and Award were to be Final without Appeal or Exception, that yet the Court did allow Exceptions to the Award as against a Master's Report, and the Words without Appeal or Exception but formula Clericorum; but the Court gave no Opinion in the Point.

(163.) Butler *versus* Wallis and Coole, Executors of Bowyer.

Lord Bridgman.

Legacies proportionable. Executor not paid first.

THE Suit was for a Legacy; the Defendants demanded Allowance for their own Legacies first; but it was denied, and ordered that an Account be taken for the whole Estate, and the Defendants and Plaintiffs to abate equally and proportionably for what the Estate falls short; and so not like the Case where Executors pay their own Debts first at Common Law, or him that first sues his Debt in equal Degree, before the other.

(163. b.)

Security upon Payment of a Legacy. Post Case 169.

AN Executor is not bound to pay Legacies without Security to refund, in Case the Estate prove not sufficient to pay Debts, to be afterwards discovered, and to refund in Proportion, if not sufficient to pay other Legacies.

(164.)

An Attachment against a Witness. Depositions suppressed.

ON the Return of a Subpœna, if a Witness will not appear and be examined, the Party may take an Attachment against him; and if he appears and deposeth on the other Side, he may suppress his Depositions on Motion.

Ro. Pitt *versus* Ro. Pelham & ux' Mab. Sherley.

(165.)

1. l. 1. Cha. Rep. 203. Cha. Cas. 176.

Devise to sell Lands, and saith not by whom. Post Case 166.

WIlliam Sherley Clarke, in the Year 1650, having jointured his Wife in Lands, by his Will confirmed her Estate, and devised that the Lands should be sold, and the Money disposed by his Wife, and to three of his Nephews by Name; and if one of them died in the Life of the Wife, then his Part of the Money to

his Cousin Higham; the same Nephew died in his Wife's Life; the two other Nephews, the Wife and Higham, sold to Pitt the Reversion on a full Consideration, by Advice of great Counsel that they might sell, and the Sale be established in a Court of Equity. The Plaintiff therefore exhibited his Bill against the Defendants, being the Coheirs of the Devisor, that they might be decreed to convey to the Plaintiff; and at Hearing a Trial at Law was directed, whether the Wife, being in Truth Executrix, might sell in her Life-Time, or whether the Executors of that Executrix. On which Point, Judgment was against the Plaintiff in the Common Pleas; and now on the Equity reserved they came to Hearing, and the Court dismissed the Plaintiff's Bill, but ordered that this be not drawn into a Precedent for the future.

Notwithstanding which it is conceived, that the Decree is erroneous, according to several Precedents in this Court, and that the Defendants ought to convey to the Plaintiff Pitt, the Intents for which they should be sold being certain, and the Lands certainly denominated, and that it should be judged in Equity a Trust in the Heir to sell, or that the same being sold by the Legatees, the Heir should not impeach the same, but confirm them, and cited Precedents, Orders 11 Jun. 39. 26 Nov. 3 Jac. 9 July 4 Jac. decreed by the Lord Chancellor assisted by the Judges; and a Case between Hyer and Wordale. Thomson devised Lands to be sold after the Death of his Wife, but saith not by whom; and the Money to be raised by the Sale to be divided amongst his Children; makes his Wife Executrix. The Elder Brother and the Executrix leased for 1000 Years, Part to Nic. A. Brother, and Part to another Brother; who sold to the Defendant Wordale; which Sale was adjudged fraudulent to overthrow the Will; and a Decree that the Land should be sold, and the Money divided amongst the Children.

The Ground of the Statute of Wills, 32 H. 8. is the Good of Children and Posterity, and though in the Principal Case here are not Children, yet the Legatees are the nearest of Posterity.

The Plaintiff Pitt's Case, upon Petition to the House of Lords, was then heard upon Appeal from the aforesaid Decree, and declared the Lands ought to be sold according to the Will. Dec. 17. 1670.

William

S. C. cited in 1. Cha. Cas. 179.

(166.) William Locton *versus* Francis Locton. 13 Nov. 13 Car. 1.

Lands deviſed to be ſold. Ante Caſe 165.

William Locton deviſeth to the Plaintiff for Life, Remainder to all his Sons in Tail, Remainder to all his Daughters in Tail, and on Failure of all Iſſue of William the Plaintiff, deviſed all his Lands to be ſold, and the Money to be divided amongſt the Daughters of Jo. and Rob. Locton, and the Sons and Daughters of Baldarſton. William the Deviſee dieth without Iſſue, the Deviſees Legatees exhibit their Bill againſt the Heir to have the Land ſold, and notwithſtanding ſome Decree made in the Life of William, upon Award by Conſent, in Prejudice of the Plaintiff's Suit, yet by Advice of the Judges a Decree was againſt the Heir for Sale of the Lands and Diſtribution, it being a Truſt in the Heir.

(167.) Smith *verſus* Alterly. 24 Car. 1.

Notice. Condition. Heir.

A. Deviſeth his Lands to his Wife, and after to his eldeſt Son, with Condition that if his Wife ſhould be with Child 80 l. ſhould be paid by his eldeſt Son and Heir at Law to the Child after the Mother's Death; the Wife had a Child, and after her eldeſt Son conveys away the Land to a Purchaſer; and on Proof that the Purchaſer had Notice of the Will, a Decree was for the Daughter for her Money deviſed, and declared it was a Truſt to go with the Lands; and yet this Will was void in Law, as to the Legacy, ſeeing he who was to have the Benefit of the Breach of the Condition was the Heir, who was to pay the Legacy.

(168.) Witneſſes may be examined before Replication (if the Plaintiff doth) not elſe.

(168. b.) Account before a Maſter, the Party may diſcharge himſelf upon his own Oath, for any Sum not exceeding 40 s. per Lord Bridgeman and Maſter of the Rolls, 27 Oct. 1672.

(169.)

AN Executor pays Legacies, leaving 800 l. Debt to pay, and dies; Administration de Bonis non was taken out; the Creditor exhibits his Bill against the Administrator and the Legatees; and the Court decreed that the Legatees should refund, for no Executor is bound to pay a Legacy, till he be secured to repay when Debts are discovered; therefore in Equity the Laches of the Executor shall not hurt the Creditor.

Legatees refund. Ante Case 163. b.

Bishop of Worcester *versus* One of his Copyholders. (170.)

THE Copyholder preferred his Bill to be relieved against a Forfeiture for Cutting Timber. Per Cur', If the Waste be voluntary, the Court will not relieve; and an Issue at Law was directed, whether he cut the Trees with an Intent to do Waste; and the Lord Keeper being pressed to alter this Issue would not alter it.

Lord Bridgeman. Forfeiture of Copyhold relievable.

(171.)

IF a Man confesseth Notice, that the Estate in Law is in a third Person at the Time when he purchased, he is bound to take Notice what the Trust is.

Notice of a Trust implied.

(172.)

J. S. deviseth 500 l. to his Daughter, and if she die before 30 Years of Age unmarried, then to be divided between three; she does receive the Money, and dies before that Time. And Resolved that the Money should be divided, and her Executor chargeable, as possessed in Trust for the Devisees in Remainder.

Devise of Money in Remainder. Ante Case 44. Post Case 280. Pollexf. 37.

(173.)

IF the Heir, to prevent the making of a Will, undertakes to pay out of Land, this binds the Heir who so undertakes.

Ante Case 37.

The case in 1. Chas. Cas. seems is very [illegible] here.

Col. Doyly *versus* Perſall.

Baleygomera of Equity ch. 2 a. pl. 17.

1 L. 1. Chas. Cas. 225. 2 L. Nicholas Abr.

(174)

Baron mortgageth the Truſt of the Wife's Term.

THE Wife having aſſigned her Term in Truſt for herſelf before Marriage, and then the Huſband, without joining the Truſtees, doth mortgage the Truſt; the Huſband being dead, the Mortgagee exhibits his Bill to have the Land conveyed to him, or that they ſhould redeem; and the Court diſmiſſed the Plaintiff's Bill; for ſince Queen Elizabeth's Time, it hath been the conſtant Practice of this Court, to ſet aſide and fruſtrate all Incumbrances and Acts of the Huſband upon the Truſt of the Wife's Term; and that he ſhall neither charge or grant it away. And it is the common Way of providing Jointures, for a Woman to convey a Term in Truſt for her upon Marriage, that it may be out of the Power and Reach of the Huſband. Neither ſhall he forfeit it by Outlawry or Felony, if for Jointure, or in purſuance of Articles of Marriage, or being the Wife's Term it is aſſigned before in Truſt, or if on other good Conſideration it be aſſigned. 1 Inſt. 351.

Term in Truſt for the Wife.

Ante Caſe 32, 86.

But if it be an Aſſignment after Marriage by the Huſband, in Truſt for the Wife, that is voluntary, and fraudulent againſt a Purchaſer; and thus was the great Chequer Chamber Caſe.

Bertie Eq. Cas. Abr. 50. at the end of the abridgment of this case.

Hayes *verſus* Hayes. 24 Feb. 1673.

(175)

L. L. Rep. temp. Finch 231. 1. Chas. Cas. 223.

Lord Keeper Finch.

Contribution by Tenant for Life to the Reverſioner.

A. Seiſed in Fee deviſeth to his Heir, on Condition that he pay to his Daughter A. 500l. at her Age of 16 Years, and in Default, that ſhe ſhould enter and raiſe it; the Heir deviſeth to his Mother for Life, and to his Brother afterwards in Fee, and dies; the Mother enters; the Daughter is under Age, and the Brother having the Reverſion and Inheritance, exhibits his Bill to have the Mother pay Part of the 500l. ſhe having Part of the Eſtate, viz. a Tenancy for Life.

Obj. The Daughter is not of Age, and ſo this Bill is quia timet only, and it may be the Mother may live till the Daughter is 16, and then the Daughter may enter and raiſe it; and ſo the Brother who is the Reverſioner, ſhall not be grieved. And the Court would be vexed with vain Suits, if any one may be admitted to ſue quia timet, to

prevent a remote Possibility. Cur: Suits quia timet are proper in Law and Equity; in Law a Warrantia Chartæ, in Equity, as where A. grants a Rent-Charge of 100 l. per Ann. in Fee, and deviseth to B. for Life, Remainder to C. in Fee, and dies; C. may exhibit his Bill to compel the Tenant for Life to pay the Arrears, else all will fall on the Reversioner; and this hath been decreed.

Suits quia timet.

And the first Case about Contribution was between where A. had mortgaged the Manor of Guildford for 2100 l. and then deviseth to B. for Life, Remainder to C. in Fee. C. preferred his Bill to force B. to pay his Share of the Mortgage Money; and it was decreed that he should; and there have been twenty Cases since of like Nature; so in the Principal Case there being a Demurrer to this Bill for the Causes aforesaid, the Defendant was ordered to answer; and Sir John Churchill moved and said for the Defendant, that she could prove that it was the Intention of the Testator here, that she should pay nothing, which was not answered, but was admitted to be material.

In the Countess of Pirlatons Case cited in L^d. Nottingham's own report of this case of Hayes v. Hayes.

Butler *versus* Bernard. 24 Feb. 1673 (176.)

AN Administrator mortgageth the Intestate's Term, and makes A. his Executor, and dies; B. takes out Letters of Administration de bonis non to the first Intestate, and claims the residuary Interest and Trust of the Term; and prays that he may have the Benefit of Redemption; but the Court decreed the Benefit of Redemption to A. the Executor of the first Administrator, who had alienes the whole Estate in Law of the Term, and was not possessed, in auter Droit, of any Part of the Interest thereof, but in his own Right; and so it shall go to his Executor, and not to B. the Administrator de bonis non.

Lord Keeper. Administrator mortgageth the Intestate's Term, who shall redeem.

Pratt *versus* Colt. (177.)

COLT's Father had given a Judgment to the Plaintiff Sir George Pratt, for 1000 l. and that Colt's Father had the Trust of the Fee of 300 l. per Ann. which descended to the Defendant, his Son and Heir, who sued the Trustee in this Court, and had the Estate in Law con-

Lord Bridgeman. Ancestor. Judgment not to charge a Trust in the Heir.

conveyed to him; and now Sir George Pratt would by the Aid of this Court extend those Lands by this Judgment.

Assets. Ante Case 157.

And it was argued, that if this had been a Term for Years, and the Trust had come to the Executor, it had been Assets in Equity; and so in this Case where the Defendant claims as Heir. The Defendant demurred to this Bill, and the Lord Keeper ruled the Demurrer good, and for Reason said the Executor claimed in auter droit, but the Heir to his own Use. But Note, That this hath not been taken to be a good Demurrer by the old and best Practisers, as little according with good Reason, for the Heir at Law is as much chargeable with the Testator's Judgment, as the Executor with the Testator's Debts; and so Equity ought to follow the Law, and the abovesaid Difference is immaterial.

(178.)

Cox *versus* Queenlock.

Lord Keeper.

Survivorship. Joint Executors. Ante Case 23. 3 Keb. 440. 3 Rep. C. 238.

THREE Executors who were all Residuary Legatees, one of them dies, and his Administrator exhibits a Bill for Distribution, and to be relieved against the Survivorship. And the Lord Keeper decreed it for the Administrator; but upon the Rehearing the Lord Keeper took the Assistance of the Lord Chief Justice North and three other Judges, who were of Opinion that it was against the Common Law, in the Point of Survivorship, and might introduce a Relief in Equity against all Survivorships in Cases of Joint-tenancy, having no other Circumstance in the Case; and so the Decree was reversed. Note; This is a much stronger Case than where the Executors are not Legatees.

Note; This was reversed chiefly on this Ground, that Debts may arise seven Years after, and so the Estate should survive for the Possibility of Advantage to the Creditors.

Chamberlaine *versus* Chamberlaine. Trin. Vacation 1674. (179.)

J. C. 1 Cha. Cas. 256.

Jo. Chamberlaine being poſſeſſed of a Leaſe for 3000 Years, and owing ſeveral great Debts, made his Will, and made his Wife Elizabeth his Executrix, who proved the Will, and paid the Debts as far as the Chattels Perſonal or Stock would reach, but not farther; and there being yet Debts unpaid above the Value of the Leaſes, ſhe aſſents to a Bequeſt of the ſaid Leaſes made by the ſaid Jo. Chamberlaine in his ſaid Will, viz. to the ſaid Elizabeth for her Life, and after to Jo. Chamberlaine his eldeſt Son for Life, and after to the firſt Son of the ſaid Jo. Chamberlaine the Son, and the Heirs Male of the firſt Son; after which Aſſent Elizabeth dies, and leaves Mr. Croft her Executor, who came to Articles with the Plaintiff for 900l. Whereupon the Plaintiff exhibits his Bill againſt the Defendant Jo. Chamberlaine the Son, and Chamberlaine the firſt Son of the ſaid Jo. Chamberlaine the Son, and Mr. Croft the Executor. Lord Keeper Finch. Ante Caſe 37, 60.

And the Queſtion was, Whether, Debts being unpaid at the Time of the Aſſent, and nothing liable to make good the ſaid Debts, ſave the ſaid Leaſes, the Leaſes might be Aſſets in the Hands of Mr. Croft, ſo that he might ſell them to anſwer the ſaid Debts, notwithſtanding the ſaid Aſſent; or whether the ſaid Bequeſt of the Leaſes were veſted in the Remainder, according to the ſaid Deviſe, by the ſaid Aſſent, and could not be deveſted by the Sale of Croft the Executor?

And now the Lord Keeper decreed Croft to convey according to his ſaid Articles to the Plaintiff, and that the ſaid Leaſes ſhould be Aſſets, notwithſtanding the ſaid Aſſent; and firſt he relied on this Rule of Court, that an Executor ſhall not be forced to pay Legacies until the Legatee ſhall give Bond to refund in Proportion or in the Whole, for the Satisfaction of Debts, if any do appear; if no Bond be given, yet if Debts do appear unſatisfied, the Legatees upon Bill in this Court ſhall refund, and this as well where it is Legatum in Specie, as a Horſe or 1000l. actually paid; for the Legacies are not due till the Debts paid, and a Legacy being paid remains as a Legacy in the Hands of a Legatee after Payment; and hence it is that a Legacy is not attachable by Foreign Attachment, Legacies paid upon Security. Ante Caſe 163. b. Foreign Attachment.

because it may work a Wrong to the Creditors, who are third Persons, and can have no Day in Court in that Suit to interplead. And for this Reason, if an Infant Executor assent, it is no good Assent, if there be no other Assets for Debts, which even the Common Law provides for the Security of Creditors; much more shall this Court provide for their Security. But if after such Assent Jo. Chamberlaine the Son had sold the Leases to a third Person bona fide, this had defeated the Creditors, for he had a good Title in Law, and the Purchaser should not be prejudiced by this Trust for the Creditors.

Purchaser on Notice of a Trust.

Devastavit.

And in this Case it was also ruled, that if an Executor make a Devastavit and die, his Executor is liable to the making good the Quantum of the Devastavit to the Creditors, if he hath Assets from the first Executor. And he cited a Case in the Spiritual Court, where they insisted upon Security to answer Debts before the Executor should pay the Legacy; and a Prohibition was prayed, but denied.

1 Rol. 612. Term limited to the first Son unborn. Post Case 212.

And in this Case, because it appeared that the Defendant Chamberlaine, the Son of the Defendant Jo. Chamberlaine, was not born at the Time of the Decease of the said Jo. Chamberlaine the Grandfather, nothing could vest in the said Infant, and therefore the whole Term remained in the Defendant Jo. Chamberlaine; and for this Reason the Bill as against the Infant was dismissed.

(180.) NOTA; This Trin. Vacation, the Lord Keeper declared it should be a Rule, that a Mortgagee after the Forfeiture should have Interest for his Interest, and should be only accountable for what Profits he should receive, and not for what he might have received, unless there were Fraud.

Interest sur Mortgage. Ante Case 34. Post Case 260.

(181.) AND Note, That it was always the Rule, that the Mortgagee assigning, the Assignee should have Interest for the Interest then due, and was never contradicted but in Porter and Hobart's Case, in the Lord Shaftsbury's Time.

Interest assignee de un Mortgage. 3 Rep. C. 258.

(182.)

THE Lord Keeper ruled it, that a Plea of Outlawry should be without Oath, because of the Averment of Identity of Persons; and ruled that a Plea of the Privilege of Oxford should be put in without Oath: Inter Masters and Bruett, 24 Oct. 1674.

Pleas without Oath. Outlawry. Privilege of Oxon.

Gyles Thornborough Clerk, and Jane his Wife, Daughter and Heir of Laurence Clifton, Gent. *Plaintiffs*;

Jo. Baker Son and Heir of Ja. Baker, Jo. Nicholl, Esq; and Jane his Wife, Administratrix of the said Ja. Baker, *Defendants*. 10 July 27 Car. 2.

(183.)

THE Question was, Whether the Heir or Executor should have the Mortgage Money? And after Consideration in this Case, Resolved, That the Executor should have it, per Finch Lord Keeper, the Mortgage being forfeited, though it was mentioned, that if the Mortgagor did pay, &c. to the Mortgagee, his Heirs, Executors or Administrators, &c.

Mortgage Money, Heir or Executor, who shall have it. Ante Case 11.

Because the Reason of the Common Law in these Cases ought, as near as may be, to be followed in Equity. Now by the Common Law, if the Condition or Defeazance of a Mortgage of Inheritance be so penned, that no Mention is made either of Heirs or Executors to whom the Money should be paid, in that Case the Money ought to go to the Executors, in regard the Money came first out of the Personal Estate, and therefore naturally returns thither again; but if the Defeazance appoints the Money to be paid either to the Heirs or Executors, there by the Common Law, if the Mortgagor pay the Money precisely at the Day, he may elect to pay either to the Heir or Executor. But where the precise Day is past, and the Mortgage forfeited, all Election is gone, for in Law there is no Redemption; then when the Case is reduced to an Equity of Redemption, that Redemption is not to be upon Payment to the Heir or Executor of the Mortgagee, at the Election of the Mortgagor, for it were against Equity to revive the Election; for then the Mortgagor might defer the Payment as long as he pleased, and

Ante Case 17.

and at last force a Composition by Payment of the Money to that Hand which will use him best; much less can the Court elect or direct a Payment where they please, for a Power so Arbitrary might be attended with many Inconveniencies; there ought therefore to be a certain Rule in these Cases, and a better cannot be chosen, than to come as near the Rule and Reason of the Common Law as may be; now the Law always gives the Money to the Executor; where no Person is named.

And where the Election to pay either Heir or Executor is gone, and forfeited in Law, it is all one in Equity, as if neither Heir nor Executor were named, and then Equity ought to follow the Law, and give it to the Executor.

For in natural Justice and Equity, the principal Right to the Mortgagee is to the Money, and his Right to the Land is only a Security for the Money; wherefore when the Security descends to the Heir of the Mortgagee, attended with an Equity of Redemption, as soon as the Mortgagor pays the Money the Land belongs to him, and only the Money to the Mortgagee, which is merely Personal, and so accrues to the Executor or Administrator of the Mortgagee; and for this Reason a Mortgage of Inheritance to a Citizen of London hath been held to be Part of his Personal Estate, and divided according to the Custom; and though it may seem hard that the Heir should be decreed to make a Reconveyance, without having the Money which comes in lieu of the Land, it will not seem so to them who consider that the Land was no more than a Security, and that after Payment of the Money, the Law keeps a Trust for the Mortgagor, which the Heir of the Mortgagee is bound to execute.

And his Lordship declared, that the Right to a Sum of Money, which is a Personal Duty, ought always to be certain, and not to be variable upon Circumstances: Wherefore his Lordship did not think it material that the Administrator in this Case had Assets without this Money; for Assets or not Assets is not the Measure of Justice to Executors or Administrators, but serves only as a Pretence to favour the Heir, who either ought to have the Money if there be no Assets, or not to have it if there be Assets.

And for the same Reason his Lordship did not think it material, that there wanted the Circumstance of a Personal Covenant from the Mortgagor to pay the Money;

for though the Case of the Administratrix of the Mortgagee had been stronger with it, yet it is strong enough without it.

And his Lordship declared, that he had considered the various Precedents in this Case which had been urged, whereof one did not come to the very Point, there being a great Difference between a Mortgage and an absolute Conveyance, with a collateral Agreement to reconvey upon Repayment of the purchase Money.

The other late Precedents, which made for the Heir, being contrary to the more antient Precedents of this Court, and to some Modern Precedents also, seemed to his Lordship of no Weight; his Lordship being of Opinion that all Mortgages ought to be looked upon as Part of the Personal Estate, unless the Mortgagee in his Life-Time, or by his Will, do otherwise declare or dispose of the same; and thereupon his Lordship decreed accordingly.

(184.) NOTE; in Casu Theire and Webb the Defendant pleaded a Release, which being proved to be delivered as an Escrow (Issue being joined on a special Replication) the Defendant was ordered to perfect his Answer on Interrogatories. Examination on Interrogatories.

(185.) THE Lord Keeper Bridgeman will not protect the Assignment of any Chose in Action, unless in Satisfaction of some Debt due to the Assignee, but not when the Debt or Chose in Action is assigned to one to whom the Assignee owes nothing precedent, so that the Assignment is voluntary or for Money then given. Chose in Action assigned.

(186.) DIfference between the Devise of Goods and the Use of Goods; the first carrieth the Property, the last carrieth not the Property. 1 Cro. 347.

(187.) MOrtgagee Assigns over for 1500l. the Amount of the Principal and Interest shall be paid to the Assignee on Redemption; 1666. Ante Case 33, 180, 181.

(188.) Campion *verſus* Ippon. 17 Oct. 1677.

THE Mortgagee ſhall be allowed Intereſt for Money beſtowed on Repairs, as for a Sum in Groſs, the Mortgagor having the Benefit of Improvement upon Account, as if it be thereby increaſed.

(189.) NO Witneſs to be examined after Hearing, to the ſame Point he was examined before.

(189. b.) MOrtgage in his Bill ſuggeſts Payment of diverſe Parts of the Money; Mortgagee by his Anſwer ſays it was paid for other Debts; no Proof on either Side; the Court muſt believe the Defendant's Anſwer.

(190.) EScape lieth not againſt the Warden of the Fleet for Eſcape of one in Execution for Breach of a Decree.

Inter Theophilum Com' Suffolk, *Plaintiff*;

Ri. Greenvill Mil' & Baronettum & Mar' ux' ejus *Defendants*. 16 Junii 7 Car. 1.

(191.) THE Defendant, the Lady Greenvill whilſt ſole, had a Decree againſt the Earl of Suffolk the Plaintiff, for 600l. per Ann. againſt which Decree the Earl prayed to be relieved, in reſpect of a Deed of Aſſignment of the Benefit of that Decree made by her Ladyſhip before Marriage to one C. in Purſuance of a verbal Agreement between the ſaid Sir Richard and the ſaid Lady, before their Marriage, that the ſaid Lady ſhould have the ſole Power and Diſpoſal of the ſaid 600l. per. Ann. after Coverture; the Plaintiff ſuggeſting that the ſaid Lady and the ſaid C. had releaſed to the Plaintiff; the Plaintiff not having the ſaid Deed of Aſſignment to produce, and alledging the Defendants had gotten it, the Defendants denied it; whereupon it was ordered, that the Defendants and C. ſhould be examined upon Interrogatories, to diſcover the Deed or a Copy thereof, and accordingly they were examined; but

Examination upon Interrogatories.

but the Matter being not at all cleared, nor what was the Contents of the Deed, more than at the former Hearing,

Lord Keeper, Juſtices, Hutton, Whitlock.

The Court declared they had maturely conſidered of the Points in Queſtion, and did agree that there was not at the laſt Hearing, nor now, ſufficient Matter or Proof to bar the Defendant Sir Richard of the Benefit of the Decree, or to relieve the Plaintiff, for that the Arrears of the 600 l. per Ann. decreed to my Lady, being in its own Nature a Thoſe in Action, cannot by Law be aſſigned over, wherefore the Aſſignment to C. though proved, had been void in Law, and being ſo ought not to be maintained in a Court of Equity (no Conſideration appearing to ſupport the ſame, which ſhould make it better in Equity than at Law) and for Sir Richard's verbal Agreement in Conſideration of Marriage to be had, it was no good Conſideration, being in Subverſion of the Grounds of Law, and of the Rights of Marriage, and not ſufficient in a Court of Equity to ground a Decree.

Choſe in Action not aſſignable. Ante Caſe 185.

But it had been otherwiſe, if ſuch Power had been ſettled in a legal Courſe, as by Conveyance executed. (2) Choſe in Action may be transferred over by Letter of Attorney, but had that been in this Caſe by the Intermarriage, the Authority had been revoked, per Cur'. (3) That all Promiſſes, Agreements and Covenants made by Sir Richard to his Lady before Marriage, are extinguiſhed by the Marriage. (4) Had C.'s Authority continued in ſtrength after the Marriage, he could not releaſe in his own Name, as here (an Executor cannot ſell in his own Name) and therefore C. remained concerned therein as before. (5) In regard C. only teſtified the Contents of the Deed, this ſingularis teſtis was not ſufficient to ground a Decree, for the Plaintiff eſpecially, becauſe of Difference between him and the Defendant, he was leſs credible, and becauſe it is dangerous to admit any one to ſwear the Contents of a Deed, but the Witneſſes to ſwear only to the executing of the Deed. The Bill was diſmiſſed, and Sir Richard at Liberty to proſecute the Decree againſt the Earl of Suffolk.

Agreement, Covenants and Authority revoked and extinguiſhed by Marriage. Poſt Caſe 192, 279.

Attorney cannot releaſe in his own Name.

Singularis Teſtis againſt the Defendant's Oath.

Contents of a Deed proved.

Domina Dorothea Dacres, *Plaintiff*;

(192.) Charles Chute and Henry Houghton, *Defendants*. Paſch. 15 Car. 2. 1663.

Ante Caſe 191. Poſt Caſe 279.

THE Plaintiff being a Widow, and having 700 l. per Ann. Jointure, the Defendant Chute's Father made Suit to marry her; but before Marriage it was agreed by Writing between them, that it ſhould be lawful for her, or ſuch as ſhe ſhould appoint, during the Coverture, to receive and diſpoſe of the Rents of her Jointure as ſhe pleaſed; Houghton the Defendant was imployed by her to collect the Rents, and he paid them to Mr. Chute by the Plaintiff's Approbation; Mr. Chute after 10 Years dies, and left the Defendant Chute, his Son, his Executor, againſt whom and the ſaid Houghton ſhe exhibited her Bill, ſuggeſting 1000 l. to be in Houghton's Hands, Parcel of the ſaid Rent. Whereupon it was decreed by the Lord Chancellor and Maſter of the Rolls, that the ſaid Agreement being ſo made between the ſaid Mr. Chute and the Plaintiff was extinguiſhed by the Marriage, upon urging the foregoing Precedent.

Agreements extinct by Marriage.

(193.) Earl of Carliſle *verſus* Globe & ux' & al' Executors of Andrews.

Lords Commiſſioners, Widdrington, Tyrrell, Fountain.

THE Plaintiff mortgaged Lands to Andrews in Fee for 1000 l. and conenanted and gave Bond to pay the Money, and forfeited; Andrews dies, leaving Globe his Heir at Law; and his Wife exhibited a Bill againſt the Plaintiff to have the Money, or elſe the Plaintiff to be foreclosed of his Redemption; on which Bill it was decreed, that if the Plaintiff the Earl of Carliſle did not pay the Money by a Day, then he ſhould be foreclosed; the Earl paid not the Money after it; after that it was diſcovered that Andrews had made a Will, and had given the Mortgagor's Money to the Executor; and now the Plaintiff exhibited a Bill, deſiring that he might be admitted to pay the Money to the Executor, he having the Right, and no Party to the former Decree; this was by Original Bill, and not a Bill of Review.

Mortgagor foreclosed.

Cur': In this Case a Bill of Review would not lie, because the Executor was no Party to the former Decree. Bill of Review.

To this Bill Globe the Heir pleaded the Decree; it was ordered he should answer without Prejudice to his Plea; per Curiam, The Plaintiff is for ever foreclosed, and the Executor shall have Remedy against Globe, who having the Land shall sell it, and the Executor shall have the Value of it, the Mortgage Money being given to the Executor. And it was ordered, That the Heir shall sell accordingly, and the Money to be brought into Court, there to remain till the Heir and Executor had interpleaded, and the Earl to be discharged from Payment thereof to the Executor. Original Bill to reverse a Decree. Post Case 197. Heir and Executor of Mortgagee.

NOTA; In Casu Piggot versus Canning. The Defendant pleads a Decree, and that the Plaintiff was Purchaser pendente lite, and the Defendant was ordered to answer, saving the Benefit of his Plea. Note; The Bill was there exhibited, to be relieved against the said Decree, Piggot being a Purchaser without Notice of Canning's Suit or Trust, and said the Decree was gotten by Fraud. (193. b.) Answer without Prejudice to the Plea.

Fatred, *Plaintiff*;

Devereux Caladon, *Defendant*. 1659. (194)

THE Plaintiff, being left to his Action of the Case at Law, moved, that in Regard his Bill was filed here within the Time limited by the Stat. of Limitations, that the Defendant might not have Liberty to plead the Statute at Law. Maynard: The Bill was only to examine Witnesses to preserve the Testimony, and not to be relieved; and this Court cannot control Statutes, and the Plaintiff might have filed his Original in Time. Fountaine: Then the Defendant would have brought it on by Proviso before the Plaintiff was ready; and it was the Practice of this Court to injoin the Defendant from pleading the Statute; and cited a Case between Chambers and Abdye soon after the Statute was made. Widdrington: It was a Doubt in Doctor and Student, whether the Chancery could relieve against a Statute Law. Hoskins for the Defendant: It was the Lord Coventry's Opinion, that if Lords Commissioners, Widdrington, Tyrrell, Mountague. Defendant injoined not to plead the Statute of Limitations.

in like Cases Defendants would not consent to waive the Plea, the Court would retain the Cause. Ordered that the Court be attended with Precedents herein.

Precedents herein, Raston and Raston, 12 Car. 1. Guy versus Symcocks, Lord Coventry's Time. 12 Car. 2. 1660, upon producing these Precedents to Chancellor Hide, he ordered a Case to be stated, and he would advise with the Judges.

(195.) Coppleſtone *verſus* Foxwell, 1660, 12 Car. 2.

Juſtice Foſter in abſentia Cancellarii.

THE Plaintiff made an abſolute Conveyance to the Defendant, by Leaſe and Releaſe of Lands, worth 100 l per Ann. in Conſideration of 1000 l. the Plaintiff at the making of the Conveyance had but the Reverſion in Fee, expectant on an old Life, which ſhortly after died; the Plaintiff then made Livery to the Defendant. The Bill was, that the ſaid Conveyance was made as a Mortgage, and the Plaintiff to be admitted to redeem; the Proof was, that the Defendant had ſaid ſeveral Times after the Mortgage, That he knew not how long he ſhould enjoy the Lands, and that if the Plaintiff would pay him his Money and Damages, he ſhould have his Land again; and this was ſtrongly urged by the Plaintiff's Counſel to be a Mortgage. Churchill of the Defendant's Counſel inſiſted, that none can come to redeem a Mortgage where the Mortgagee cannot compel the Payment of the Mortgage Money; for the Remedy ought to be reciprocal; and in this Caſe the Defendant hath not any Remedy for his Money; and moreover that if it were a Mortgage it muſt be ſo a principio, either by a Condition in the Deed it ſelf, or by ſome collateral Deeds or Agreement made at the ſame Time; as a Defeazance at Law cannot be after the Eſtate executed; and in this Caſe it appears not that it was a Mortgage at firſt, but a nude ſubſequent Agreement, of which there was no Execution. The Matter was compromiſed by Conſent.

Mortgage.

Remedy of Mortgagor and Mortgagee muſt be reciprocal.

Parol Agreement after an abſolute Conveyance cannot make a Mortgage.

Defendant injoined not to plead the Statute of Limitations.

I Merry

Merry *versus* Abney the Father, Abney the Son and Kendall. 26 Nov. 1663. 15 Car. 2. (196.)

KEndall contracted with the Plaintiff to sell him certain Lands in Leicestershire; after which Abney the Father, living near those Lands, in the Behalf of Abney the Son, a Merchant in London, purchased those Lands of Kendall, and had a Conveyance from Kendall to Abney the Son and his Heirs. The Plaintiff's Bill was to be relieved upon this Contract with Kendall, and against the Conveyance, and charged Notice of this Contract to both the Abneys. Abney the Son pleaded himself a Purchaser bona fide, upon a valuable Consideration, without Notice of Kendall's Contract with the Plaintiff, and without any Trust for his Father.

Judge Foster and Master of the Rolls.

Contract for Land, another purchaseth without Notice.

Nota en cest contract, the Vendor is seised in Trust for him who contracteth.

Cur': Notice to the Father, who transacted, is Notice to the Son, and shall affect him; so Notice of a Dormant Incumbrance to one, who purchaseth for another, is Notice to the Purchaser; and accordingly this Case was decreed at the Hearing, viz. That they should convey to Merry the Plaintiff, it appearing at the Hearing, that Abney the Father had Notice of Merry's Contract before he purchased for his Son.

Notice to one who purchaseth for another, Notice to the Purchaser.

Purchaser.

Kath. Venables *versus* Foyle. Trin. 1660. 12 Car. 2. (197.)

THE Defendant, being Mortgagee of a Lease belonging to Winchester College, exhibited his Bill formerly against the Plaintiff, to redeem or be foreclosed; the Plaintiff (then the Defendant) by her Answer said that she was not willing to redeem, but that the Plaintiff Foyle would satisfy himself by Perception of the Profits; thereupon an Account was made up between the Plaintiff and the Defendant as to what was due to the Defendant; after which for the whole Debt, the Defendant Foyle assigns to Nich. Venables her Son, reciting the said Suit to redeem, and that his Title was a Mortgage forfeited.

Lord Chancellor, Judge Foster.

Mortgagee assigning after Forfeiture, decreed to account for the whole Time, without the Assignee being Party.

Now Kath. exhibits her Bill against them both for Redemption. Nich. Venables pleads several Outlawries; Foyle answered fairly, that he had assigned over to Nich. Venables for what was his due and no more. This Cause proceeded

ceeded to Hearing against Foyle only, and in Verity the Case was no more but that a Mortgagee assigns over for his due Debt. The Plaintiff's Counsel insisted, that it was a Breach of Trust; and it was agreed that Foyle should account for all the Profits both before and after the Assignment, and pay the Overplus above his own Debt, with Damages to the Plaintiff, and convey, and procure all under him to convey to the Plaintiff, free from Incumbrances; afterwards Foyle not able to perform the Decree, exhibited his Bill against Kath. Venables and Nich. Venables, setting forth a Fraud and Practice between them, that he was willing to account to the Time of the Assignment, and that Nich. Venables might account for what he received afterwards, and reconvey. Nich. Venables exhibited his Bill against Kath. his Mother, claiming the Original Lease by Title paramount hers; and at hearing these two last Causes about a Year and Half after, it appearing that Nich Venables had a Title to the Lease paramount his Mother, Foyle was upon this Matter discharged of the Decree against him.

Breach of Trust.

Decree avoided by Original Bill.

Ante Case 193.

(198.) Ayloffe *versus* Duke, 1655.

Lords Commissioners.

Original Equity remains after a Verdict.

MRS. Ayloffe tore a Bond of 800l. and a Verdict against her for 800l. in an Action of the Case; she prayed Relief here, for that the Bond was but a collateral Security, and that if the Bond were in Being, the Obligee in Equity should be barred of his Recovery thereon; and therefore though the Jury had done well in their Verdict for 800l. the Bond being for 800l. yet she ought to have the same Remedy against the Verdict in Equity, as she might have had against the Bond, if it were in Being. and upon this she was relieved; and in this Case the Bill did not complain of or arraign the Verdict, but admitted the Verdict, and sought Relief upon the Original Equity.

Sir

Sir Samuel Jones and William Jones, Executors of Sir William Jones *verſus* Bradſhaw.

Paſch. 1661. (199.)

MAry Cotten bequeathed 500l. to one Dormer, and made Sir William Jones her Executor, and died; Sir William Jones ſold Lands of his to Sir Sam. Jones, and left 500l. of the Purchaſe Money in Sir Sam. Jones's Hands, who gave Bond for the 500l. to Sir William Jones; Sir William made his Will, and the Plaintiffs his Executors, and died; they inventoried the 500l. as Part of Sir William's Eſtate. Afterwards Dormer obtains a Decree againſt the Plaintiffs for the 500l. upon this, that the 500l. was left in Sir Sam. Jones's Hands with Intent, and upon Truſt that he ſhould pay it to Dormer; the Court then declaring it was not Aſſets of Sir William Jones's Eſtate, though inventoried as ſuch. Afterwards the Defendant, Bradſhaw, brought Debt againſt the Plaintiffs in this Cauſe, on a Bond of their Teſtator Sir William Jones; and they not having other Aſſets, this 500l. being ſo decreed, and that Decree and Payment thereupon not to be given in Evidence, or pleadable at Law in that Action; thereupon the Executors Plaintiffs exhibit their Bill here againſt Bradſhaw, ſetting forth their Caſe to the Effect ſupra: And the Queſtion was, Whether the Plaintiffs ſhould have an Allowance for the Payment of the ſaid 500l. againſt the now Defendant? And it was decreed that they ſhould, and that the Matter ſhould go to an Account: And Sir Jo. Maynard ſaid, That if a Man ſell his Land, and leave 500l. of the Purchaſe Money in the Purchaſer's Hands, and then give or appoint this Money to be paid to a Stranger, and after maketh his Will, this Stranger ſhall have the Money, and it ſhall not be Aſſets. Vide Hob. 265.

It was admitted that Mary left Aſſets to Sir William Jones.

The Court did not condemn the 500l. as Part of Sir William's Eſtate, but with a Retroſpect to the Original Bequeſt.

Decree for a Legacy not pleadable at Law.

Money depoſited to a ſpecial Intent not Aſſets to another. Ante Caſe 10.

Collwell *versus* Sir William Child, Master in Chancery.

(2co.)

Master of the Rolls.

Reference.

ALL Parties to the Suit were content to refer the whole Matter to Serjeant Maynard, finally to hear and determine; and old Child, the now Defendant's Father, signified his Consent by subscribing a Paper to that Purpose, so as the Award was made by a certain Day limited by that Paper; that Time elapsed, and then the Court, in Presence and by Consent of all Parties, but old Child who was then absent, and by the Assent of his Solicitor, referred the Matters back to Serjeant Maynard; but it was inserted in the Order that he should finally determine. Upon this, Serjeant Maynard made an

Award.

Award, which was afterwards decreed, nisi Causa: Old Child shewed for Cause, that he did not consent, and his Solicitor made Oath that he did not consent that Serjeant Maynard should finally determine; yet the Award was decreed.

Review.

Thereupon a Bill of Review was brought, and Error assigned; and upon hearing this Bill of Review, it was

Matter dehors Error.

insisted, that the Matter was dehors, and not contained in the Decree; and it was said that the Court could not take Notice of that, in as much as nothing of the Dissent appear'd in the Decree.

Solicitor's Assent.

Then it was insisted, that the Assent of a Solicitor to an Award of final Determination shall not bind the Party To which it was objected, that Solicitors here are like Attorney's at Law, who may confess Judgment, &c. and to prove that Solicitors are so considered, they instanced in Masters Reports, made by Solicitors Assent. To which it was answered, and resolved by the Court, that though Solicitors Consents shall bind their Clients in Interlocutory Orders, yet they shall not bind in Orders of Award for final Determination.

2. It was resolved, That it shall not come on the Plaintiff's Side to shew the Dissent of old Child, but on the Defendant's; for by the Decree it appears, that the A-

Award decreed.

ward was made by the Assent of the Solicitor, and if the Decree want a sufficient Foundation, it is Error, and the Plaintiff shall not be bound to prove a Negative; and a Case was cited between Brookes and Dickers 1652, where

an Award was set aside for that the Party did not actually assent to the Reference, although he attended the Reference in the Business.

3. The Award was but of Part of the Matters in Controversy, and the Submission was of the whole Matters, and that allowed to be Error. Award of Part.

4. The Decree was impossible, because old Child was Awarded to pay a Sum of Money 24 Jan. 1664, whereas the Decree was dated after 1664, and so impossible; and this Error was allowed. Award impossible.

5. That the Award was repugnant, viz. it appearing that old Child was to pay so much in Satisfaction of 1000 l. in Controversy, and that he should also pay another Sum in Satisfaction of the Residue of the 1000 l. whereas it appeared there was no Residue; and this Error was allowed, and the Decree reversed. Award repugnant.

Then it was moved that the Solicitor should pay Costs for his pretended Assent; but Resolved, that he should not, for the Assent was in Court, and being an Act of the Court, the Solicitor shall be indempnified. Solicitor assents in Court; no Costs.

Nota; If there be Error in one Part of a Decree, not dependant but distinct from the other, the Court will reverse but for Part; so at Law a Sci' Fa' to reverse a Patent for Part. Decree reversed in Part.

(202) (20c. b.)

TEnant of Frank Tenement descendible agrees to sell to B. and B. pays him Part of the Purchase Money; the Vendor dies, and his Heir enters; the Vendee exhibits his Bill against him, to have his Contract executed. Resolved, by the Lord Keeper Bridgeman and others, that the Plaintiff shall not be relieved; for the Heir is but special Occupant, and does not claim under his Father, and therefore the Covenant or Agreement of his Father shall not oblige him to a Conveyance of the Land; This was about 1672. Contract to sell Land executed. Special Occupant.

Sheldon

Sheldon *verſus* Wildeman.

(201.)

Upon a Plea, 13 Car. 2. 1661, 11 Oct.

Judge Hide. Truſt not barred by the Statute of Limitations Vide Caſe 202.

BILL was to have Money delivered by the Plaintiff's Father to the Defendant, to compound for the Plaintiff's Father's Eſtate, then ſequeſtred for deviſing Money at Goldſmiths-Hall; the Plaintiff was Executor to his Father. The Defendant pleaded the Statute of Limitations, 21 Jac. 16. Upon arguing this Plea it was inſiſted by the Plaintiff's Counſel, that an Account for Money delivered on a Truſt was not within the Statute; and ſo Reſolved; and thereupon the Defendant ordered to anſwer; and the Plea over-ruled in Trin. Vacation 16 Car. 2. The Cauſe was heard by the Lord Chancellor, Judge Windham and Twiſden, and they were all of Opinion that the Stat. of Limitation did not bar the Suit, becauſe it was a Truſt. But the Bill was diſmiſt for another Reaſon.

Sir Edward Heath *verſus* Hanley, Whitwick.

(202.)

On a Plea, 21 Maii 15 Car. 2.

Chancellor, J. Wyndham.

THE Plaintiff was Son and Executor to the laſt Chief Juſtice Heath, ſo made at Oxford during the Difference between King and Parliament, but never ſat as Chief Juſtice in Weſtminſter-Hall. The Bill was to have an Account of Money received by the Defendants, as Prothonotaries of the King's Bench, which was all to belong to the Chief Juſtice; which Monies they by their Office ought to receive for the Chief Juſtice, by an implied Truſt Virtute Officii. The Defendants plead the Statute of Limitations 21 Jac. 16. Inſiſted, that the Truſt was not within the Statute of Limitations. Anſwered on the other Part, that a Guardian, &c. was within the Statute, and he was Truſtee, &c. Ordered that the Defendants ſhould Anſwer.

Limitations. Truſt. Vide Caſe 201.

Davies *versus* Beversham and his Wife. (203.)

Mich. 13 Car. 2.

Chancellor, Master of the Rolls.

Devise of Lands contracted for.

After Contract the Vendor seised in Trust.

HEnry Davies agrees for the Purchase of certain Copyholds, which were surrendred out of Court to his Use, but before Admittance he dies, having other Copyholds; and having made his Will after the said Contract, he deviseth to the Plaintiff, who was then his visible Heir, all his Copyholds; his Wife after his Death, being then priviment enseint, was delivered of the Defendant's Wife, who then became Heir to the Devisor. The Plaintiff admitting that the Copyhold contracted for did not pass by the Will, takes a Lease of it from the Heir for 20 Years, and agrees to hold it longer at the Rent; afterwards Differences arising, the Plaintiff sues for the Copyhold so contracted for, as passing by the Devise supra; and declared by the Court that the Copyhold did pass by the Will to the Plaintiff, for that the Purchaser had an Equity to recover the Lands, and the Vendor stood seized in Trust for the Purchaser; and the Case of the Lady Folcomb 1651 was cited, wherein it was ruled, that if, upon Articles for a Purchase, the Purchaser dieth, and deviseth the Land before the Conveyance executed, the Lands do pass in Equity.

Estoppel in Equity by Admittance.

But in the Principal Case, because the Plaintiff had admitted the Title to be in the Defendant, and paid Rent and agreed so to do, the Court would not decree, but declared, if the Plaintiff had come in Time, it had been proper for a Decree.

Lee *versus* Hall. 31 Jan. 14 Car. 2. 1661. (204)

Chancellor, Master of the Rolls, Judge Hide.

Devise of a Moiety of the Personal Estate.

DEvise of the Moiety of the Personal Estate to the Wife, and then of diverse Legacies, and then of the Residue to another: Resolved the Wife shall have a full Moiety, if the other Moiety be sufficient to pay the Debts, and that the Debts shall go wholly out of the other Moiety, Dy. 164. Against which it was objected, that the Husband should not bequeath any Part till the Debts paid, and that therefore the Debts ought to be first deducted out

Off. Exec. 361. Ante Case 73.

of the Whole; but that Objection was over-ruled, the other Moiety being sufficient for the Debts in this Case. (2) Ruled, That by the Bequest of a Moiety of the Personal Estate, where the Testator had Money, Bonds and a Lease for Years, a Moiety of the Lease for Years passed, although it was objected that that was not usually reckoned Personal Estate.

Personal Estate.

(204. b.) Bretton *versus* Bretton. 12 Car. 2.

Devise to younger Children.

MONEY was bequeathed to younger Children, where there were diverse Daughters, and one Son, who was the Heir at Law, and had a fair Inheritance, yet was by Birth a younger Child. Decreed that he was not a younger Child within the Devise, and should not take by it, being Heir at Law: The like Case was adjudged so by the Master of the Rolls, inter Mead and Cane & al', 16 July 1663.

(205.) Gilbert *versus* Faules. 12 and 17 Feb. 14 Car. 2. 1661.

Chancellor, Master of the Rolls.

No Dismission after a Decree.

BILL was to be relieved against an Action for Rent; and at the Hearing of the Cause it was decreed to an Account; the Account was stated by the Master; then the Plaintiff moved to dismiss his Bill, paying what Costs the Court would assess; which was opposed, for that the Judgment of the Court being given, the Plaintiff ought not to abuse the Court and depart from it; and the Case of Wingfeild and Thomas was cited, where upon an Obligation, the Plaintiff here was decreed to pay Principal, Damages and Costs, and after the Plaintiff there would have dismissed his Bill, but it was denied. Churchill, Quilibet potest renunciare Juri pro se introducto. The Master of the Rolls directed it to be moved before the Lord Chancellor, and the 17 Feb. it being moved before him, it was denied; and the Lord Chancellor and Judge Browne, in 17 Car. 2. between Cheatly and Packington, gave the same Rule in the like Case.

Edgeworth *versus* Davies. 1 July 14 Car. 2. (206.)
Upon a Plea.

BILL was to have an Account of the Profits of Land, which the Defendant had received on a Trust for the Plaintiff during his Minority, and for Money received upon Bonds for the Plaintiff, and for Writings, &c. The Defendant pleaded, that the Lands lay in Cheshire, within the County Palatine of Chester, and in Lancashire within the Duchy; and that the Defendant lived within the County Palatine of Chester, and not within the Jurisdiction of this Court. This Case having been formerly argued before the Judges, in the Absence of the Chancellor, they caused Precedents to be searched; and now Precedents were produced, as Herne versus Smith, 12 Eliz. for that Lands lay within the Duchy, was over-ruled; Smith versus Delves, 7 Nov. 2 Jac. Bill being for Evidences, the Defendant pleads, that the Lands concerned lie in Cheshire, and that he lived there, and so not within the Jurisdiction of this Court but of the County Palatine; but upon Argument the Suit not being for the Lands, but for the Writings, the Plea was over-ruled. Sherborne versus Vaughan, 13 May 14 Car. 1. Bill was to be relieved on a Trust; the Defendant pleaded the Jurisdiction of the Duchy, this was Ex parte; but in my Lord Coventry's Time, Hales versus Daniell, 24 Oct. 5 Car. 1. ad idem, in which Case the Bill being for a Personal Thing, that Court over-ruled the Plea of County Palatine; and in the same Case, Mr. Page, to whom it was referred to certify, reported upon View of Precedents, that the Jurisdiction of the County Palatine was allowable between Parties dwelling in the same County, and for Lands there, and for Matters local; and in the Argument of the principal Case, I cited the Case of Sir Jo. Egerton and the Earl of Darby, 4 Inst. and upon long Debate in the principal Case, the Plea was over-ruled, but without Costs, Hob. 77. Owen versus Holt.

County Palatine.

Clearke

(207.) Clearke *versus* Lord Angier. 3 July 14 Car. 2.

Upon a Demurrer.

Chancellor, Baron Turner.

Baron and Feme.

A Legacy being given to a Feme, whilst she was Covert, the Husband of the Wife without her exhibits a Bill for it; because the Wife was no Party, the Defendant demurred; for of Things merely in Action belonging to a Wife, as a Bond, &c. she ought to join in Suit; but otherwise it is of a Rent accruing in the Wife's Right after Marriage; and if the Husband alone should sue or be dismissed, that will not conclude the Wife; and if he die before Judgment or Decree, the Wife cannot revive the Suit.

1 Inst. 351.

(208.) Anonymus. Upon a Demurrer after Trin. Term 1662.

Chancellor.

Oath to be made of the Loss of Writings.

THE Bill was barely to discover a Deed; the Defendant demurred, for that the Plaintiff had not made Oath according to the Course of the Court, that he had not the Deed. Serjeant Glynn for the Plaintiff, That in this Case Oath is not required, and took this Difference, that when the Bill alledgeth the want of a Deed, and seeketh Relief upon the Matter of that Deed, by a Decree, there such Oath is Necessary; but when the Bill seeks no Relief, but barely desires that the Defendant would discover whether he hath such a Deed or not, or to have it produced at a Trial, in that Case the Plaintiff ought not to be put to his Oath; for it is not presumed the Plaintiff would exhibit a Bill in either of the latter Cases if he had the Deed: This Difference was approved by the Lord Chancellor, and therefore the Plea was over-ruled.

Roberts *verſus* Wilks, Robinſon & al'. (209.)

Paſch. 15 Car. 2. 1663.

Chancellor. Injunction to the Exchequer.

THE Plaintiff here exhibited his Bill firſt; to which the Defendant put in an inſufficient Anſwer, and ſo detained the Plaintiff here; and then exhibited a Bill in the Exchequer in the Nature of a Croſs Suit, and poſted on that Cauſe there; wherefore the Plaintiff moved for an Injunction to ſtay Proceedings on that Bill in the Exchequer.

Verdall & al' *verſus* Harvey. 7 Feb. 8 Car. 1. (210.)

Lord Keeper, Coventry. Injunction from the Exchequer to the Chancery.

THE ſame Day that the Plaintiff's Cauſe was to be heard in Chancery, the Defendant cauſed the Plaintiff's Counſel in Weſtminſter-hall, as they were going to the Chancery Bar, to be ſerved with an Injunction out of the Exchequer, to ſtay the Suit, which the Plaintiff's Counſel declared to the Court: Whereupon Counſel not attending, a farther Day was appointed, and the Defendant ordered to attend then, which accordingly he did; and by the Declaration of the Plaintiff's Counſel and the Defendant's not denying it, the Caſe upon the Injunction being as aforeſaid, the Court appointed two ſeveral Orders, made by Chancellor Elſmore, to be read, by one of which it appeared that an Officer of the Cuſtom-Houſe being ſerved with Subpœnas to anſwer Bills there, would not anſwer thereunto, but procured an Injunction out of the Exchequer, and ſerved it. Ordered there, That the Plaintiff might proceed, notwithſtanding the ſaid Injunction, and by another committed for the Contempt of this Court; and the Lord Keeper declared that ſo it might be done in this Caſe, but would hear the Defendant's Counſel, and that upon hearing the Cauſe it might be diſmiſſed or retained, as was juſt; and he asked the Defendant if he would waive the Injunction, and proceed in the Cauſe; to which he anſwered, that he had no Counſel, and deſired Time to adviſe; the Court was willing that his Counſel ſhould be heard, if alſo the Plaintiff's Counſel might be heard, which the Defendant refuſed, pretending

he was not able to waive the Injunction; which the Court denied, since it was his own Suit; but the Defendant still refusing, the Court ordered the Plaintiff's Counsel to open the Cause, which was done accordingly; and the Defendant allowed another Day for his Counsel to defend, so that the Matter of this Cause might be freely Debated on both Sides; which the Defendant refused: Whereupon the Lord Coventry declared that the Court would not give Way to this Injunction, for if it be pretended that the Defendant be a Receiver of the Exchequer, that hath been over-ruled by Multitudes of Precedents, upon great Deliberation in the Time of the Lord Bacon, Sir Thomas Bromly and Elsmore, and other Chancellors and Keepers, and since his Lordship was Keeper, upon the Precedents, and upon Conference with Chief Baron Walter and the rest of the Barons.

Receiver of the Exchequer sued.

(211.) ONE Clerke was ruled to answer, upon pleading the Privilege of the Exchequer, being an Officer there, and did answer; and so did one Vernon upon the like Plea; and the Lord Coventry said, that in Case the Privilege were allowable where one single Accountant there was sued here, yet it is no Plea where the Bill is against an Accountant and another, as here; for there is no Colour for it neither in this Case nor any other.

Two Defendants, one Priviledged.

And whereas it was objected that the Chequer had the Priority of Suit in this Case; it was answered, that did not appear, and that the Plaintiffs here were Strangers to the Suit in the Chequer; and there are frequent Precedents, where the Defendant in a Court of Equity hath been admitted to a Cross Suit in another Court of Equity, without expecting the Event of the first Suit; for if the Plaintiff in the first Suit surcease or be dismissed, the Defendant hath no Help here but by his Cross Suit; and the Chequer hath suffered new Suits there touching Matters judicially settled here; and this Court hath done the like by the Chequer.

Priority of Suit.

Decrees in the Chequer examined here.

And his Lordship declared that he did not conceive any Suit in Equity between Party and Party was maintainable in the Exchequer, but by Reason of Privilege, and that Privilege holdeth not, unless all the Plaintiffs or Defendants be privileged; and therefore as this Court doth not hinder the Proceedings in the Exchequer, so it doth Order, notwithstanding the said Injunction, the Plaintiffs

be at Liberty to proceed here, and the Defendant and his Counsel are injoined not to move in the Exchequer to hinder the Proceedings of this Court, for which Purpose the Plaintiff here may take an Injunction; and as for the Defendant's Contempt his Lordship will advise farther; and the Defendant to attend here de die in diem according to a Recognizance to that Purpose.

Vide Chancellor Hide's Rules. Transactions in one Court of Equity, how and when pleadable in another.

Sir Henry Goring & al', *Plaintiffs*;

Ch. Bickerstaffe, Eliz. his Wife, Jo. Eversfield per Guardianum suum, Dame Anne Alford, Widow, and Jo. Alford by the said Dame Anne his Guardian, *Defendants*. (212.)

J. C. Collect. f. 31. 1. Cha. Car. 4. 1. Bridgm. Mss. Rep. 74. L. Nott. Mss. Bolegoniana of Equity. 10. 1. 15.

Jo. Alford deceased, being seised of the Manor of Hams, &c. by Indenture, 9 April 14 Car. 1. and Fine thereupon, settled the same to the Use of himself for Life, the Remainder as to Part, to the Use of Frances his Wife for Life, for her Jointure; the Remainder to his first and fourth Son in Tail; Remainder to Sir Edward Alford, his Brother, for Life; Remainder to Sir Edward Alford's first, and all other his Sons in Tail; Remainder to his own Right Heirs, under a Proviso that it should be lawful for Sir John and Sir Edward, when they should be solely seised of the Premisses, or any of them, at their Pleasure, to make Leases of the same or any Part thereof for 21 Years, under what Rent they pleased.

Chancellor, Ch. J. Foster, Ch. J. Bridgman and Ch. Baron Hale.

Appeal from a Decree made by the Master of the Rolls, by the Defendant Dame Anne only.

7 July 1643 Sir John Alford made his Will, whereby he gave his Daughter Jane, the Defendant Eversfield's Mother, 600 l. and to his Daughter Elizabeth, now the Wife of the Defendant Bickerstaffe 500 l. to make her Portion 3000 l. and devised to her all his Messuages in White-Friers, London, Pitch Hatch and Huswell-street in Middlesex, and in Wiggen-Hold in Sussex, Habendum to her and the Heirs of her Body, Remainder to Sir Edward Alford and his Heirs; provided that if Sir Edward paid Elizabeth 2500 l. at her Marriage or 21 Years (which should be first) the Estate to her to cease, and the Premisses to remain to Sir Edward and his Heirs; and of his said Will he made Frances his own Wife Executor.

And afterwards, pursuant to this Power, by Indenture 14 April Car. 1. and by Indenture 3 January 1648, did demise to

to the Plaintiffs the greatest Part of the Manor of Hams, &c. from Michaelmas then last past, for 21 Years, rendring 10 s. in Trust that they should permit the said Jo. Alford, during his Life, to take and receive the Rents and Issues of the said Manor; and upon farther Trust, that after his Decease Frances his Wife should receive the Profits of the said Manor in Satisfaction of her Jointure, so far as the Premisses by any former Assurances were any Way liable thereunto; and to permit her, during her Life, to receive out of the Residue of the Premisses 120 l. per Ann. during the Life of her Husband, if the Term so long continued, and should permit his said Wife, if the Term so long continued, to receive the Residue of the Rents during the Residue of the Term of 21 Years, if she should so long live, to the Intent she should pay thereout so much Money towards the Legacies as his Personal Estate should be wanting in; and to pay the Residue to such Persons as the said Sir John Alford should appoint by his Will, and for want of such Appointment to retain the same to her own Use; and upon farther Trust, that the Plaintiffs after the Death of Frances, during the Residue of the Term of 21 Years, should permit such Person and Persons, as the said Sir John Alford should in his Life-time, by any Writing by him sealed in the Presence of any two credible Witnesses, or by his last Will appoint, and for want of such Nomination, and after the Death of such Nominee, the Heirs of the said John Alford to have and receive all and singular the Rents of the Premisses.

The said Sir John Alford, by a Deed-Poll the same 3d of Jan. 1648, signed and sealed in the Presence of four credible Witnesses, thereby reciting the said Demise and Trust, did nominate the eldest Son of Sir William Alford, his Brother, to have out of the Residue of the Premisses 50 l. per Ann. and his two youngest Sons 60 l. apiece; and the said Sir Edward Alford to receive the rest of the Profits, by the Trust of the said Demise limited to be paid by the said Frances, and after her Death to receive the Residue of the Profits during the Residue of the Term to his own Use. It appeared by one Witness, that Sir John Alford, three or four Days before his Death, which was before the Trust, and Declaration of Trust, did acquaint that Witness that he had settled that Estate in Hams well, as he thought; and that his Brother Sir Edward Alford was by Agreement to have all his Estate af-

ter

ter his Death, and that he thereout appointed some Allowance to his Daughter Eversfield, and declared that the Defendant Elizabeth, now Wife of the Defendant Bickerstaffe, was not to have any Thing out of his Estate there, for that he had otherwise provided for her. John Alford the Night of the same Day, wherein the Declaration bears Date, died without Issue Male, leaving the two Daughters his Heirs. Sir Edward Alford died Intestate 1653; the Defendant Dame Anne, his Relict, had taken out Administration. Jane the Mother of the Defendant Jane Eversfield, and whose Heir she was, died in the Life of Frances her Mother; Frances having proved the said Will of her Husband died 1659, having made Elizabeth Bickerstaffe her Executrix.

Trustees prefer a Bill to pray an Interpleader by those who claim the Trust.

The Defendant Dame Anne, Administratrix of Sir Edward Alford, the Defendant John Alford as first Son and Heir of Sir Edward Alford, the Defendant Bickerstaffe and his Wife as Executrix to Jane, who was Executrix of Sir John Alford, and John Eversfield as Coheir with Elizabeth to Sir John Alford, all claimed the Benefit of the Trust, during the Residue of 21 Years after Frances her Death. The Bill was that the Defendant should interplead, and to have the Direction of the Court to whom the Trust belonged.

Upon the Hearing by the Master of the Rolls, 28 Nov. Car. 2. In as much as the Power reserved to John Alford by the Lease is, that after the Death of Frances the Trustees should permit such Persons as he should nominate, and after the Death of the Nominee, his own Right Heirs to receive the Rents, &c. the Court was of Opinion that John Alford has thereby no Power to nominate any Person to receive the Rents, &c. but during the Life of the Nominee and no longer, for after the Death of the Nominee, the Heirs at Law are nominated by the Original Deed to receive, &c. And when after by the Deed Poll Sir Edward is nominated to receive the Rents, that must be intended, if he live so long, for the Deed Poll recites the Deed, and is in Pursuance of the Trusts therein; and that John Alford's Intention in the Original Lease is certain, that after the Death of the Nominee, his own Heirs should have the Residue of the Trust, and both the Deeds being executed together are to be taken but as one Assurance; and if he had intended that the Heirs, Executors or Administrators of Sir Edward should have the remaining Part after Sir Edward's Death, he would have named them as well as Sir Edward;

Power.

Two Deeds but one Assurance.

and for that the Interest of the Term was always in the Plaintiff, and not in Sir Edward, but only as Nominee to the Profits, he being Dead the Trust to him ceaseth, and nothing passeth to the Heir or Administratrix, but remaineth to Elizabeth the surviving Daughter, Heir and Executrix of John Alford; and the Testimony of Elizabeth can be intended to relate to no other Settlement but the first, by Deed and Fine, and to the Second, raising the Trust in the Lease which was not then in Being, made after the Discourse the Day of his Death; and that the Residue of the Trust of the Term doth remain to the Heirs at Law of John Alford, who in a doubtful Case ought to be preferred, especially when it is so consonant to the Intention of John Alford, and the Defendant Elizabeth also, his Executrix; and doth therefore Dyer and Decree the same accordingly, and that the Rent Arrear, and for the future, be paid to her, &c.

Heir at Law preferred.

And upon the Appeal the Question was upon the whole Case, Whether John Alford had Power to dispose of the Residue of the Term of 21 Years, after the Death of Frances, or whether he were not restrained by the Limitation of the Trust to the Heirs after the Death of the Nominee? It was offered by the Counsel of the Appellant, that Sir John Alford, after two Limitations to two Persons, had not Power to limit to a Third after the Death of the Second, because it is an Executory Devise upon an Executory Devise, and tends to the Intailing of a Chattel and making of a Perpetuity, and this Limitation of John Alford they said was out of the Power of the Trust, and not out of the Interest of the Term.

Power.

Perpetuity.

Executory Devise.

Term for Years limited. Ante Case 179.

Trust of a Possibility.

Limitation of a Trust to the Heir of the Limitor. Ante Case 157.

The Court did all agree in one uniform Opinion, that the Limitation of a Term to several Persons in Remainder one after another, if those Persons were in Being, and particularly named, could not tend to a Perpetuity; otherwise, if the Persons were not in Being, and that a Man might declare the Trust of a Possibility in Remainder, but that the Limitation of a Trust of such Possibility to the Heir of the Limitor was a void Limitation, and the Trust was in the Limitor, though of a Chattel Real. And he having by the Deed Poll the same Day limited the Lease, which was made pursuant to the Power of the first Settlement, to Sir Edward Alford, the whole remaining Term after the Death of Frances, without any other Limitation or Restriction, which he might have done, the same was a good Limitation of it

to Sir Edward Alford, his Executors and Administrators; and if the Power of John Alford had been defeatible, his Interest ought to come in Aid to make good the Legacy of 50l. and 60l. per Ann. and of the remaining Term, and otherwise the Trustees might come in and claim the Lease, discharged of all Trusts; and there being nothing to oppose the Limitation of the Trusts, but the implicated and mistaken Expressions of the Deed, the whole Court resolved, That the former Decree was grounded upon a mistaken Foundation, and that taking both Deeds together, they ought to be interpreted, that the Power, Interest and Limitation of Sir John Alford, was to Sir Edward Alford, being explained by the said one Witness; and that Sir Edward Alford, his Executors and Assigns ought to have the Term after the Death of Frances, and Dame Anne therefore intitled thereunto as Administratrix of Sir Edward Alford; and therefore ordered and decreed accordingly, and that the former Order and Decree be discharged; and that the Plaintiffs shall come to an Account for, and pay the said Dame Anne the Rents and Profits, and convey to her if required, &c. Mo. 809. Hatton, Cox and Mollineux, 1 Co. 156. 1 Cro. 577. 10 Co. 47. 8 Co. 42. And Quære, Why the Trust of a Possibility of a Term is declarable when the Remainder of a Possibility is not assignable. 8 Co. 96.

The Interest of the Limitor of a Trust shall supply the Power of declaring a Trust, if defective.

Remainder of a Term to one, generally gives the whole Remainder to him.

On this Bill to pray Interpleader, Judgment to account with, and also to convey to one Defendant.

Law and Equity differ.

Parker *versus* Plummer. Upon an Appeal from a Decree at the Rolls. 27 Jan. 14 Car. 2. (213.)

PArker sold a Lease which he had for three Lives from the Dean and Chapter, to Plummer, and it was agreed Plummer should pay 4320 l. for it; after the Defendant agreed with the Plaintiff, that if he would abate him 420l. he would reconvey the Lease whenever the King and Dean and Chapter were restored; the Plaintiff thereupon abated the 420 l. and King Charles being now restored, the Plaintiff exhibits his Bill for the Lease, which the Master of the Rolls decreed to him. Note; This was decreed against the Son of the Purchaser, the Father being dead. Quære, Whether he came in by Settlement or as Occupant. Upon Appeal this Decree was affirmed by the Lord Chancellor and Justice Bridgeman. In this Case it was objected, that this Court ought not to decree it, for it was in Nature of a Wager, and the Consideration

Bare Agreement decreed in Specie.

Nota, Here was the 420 l. abated, and so executed on one side.

ration unequal and penal; and that an Action more properly lay; and that it was in the Discretion of the Court to decree Agreements, or not, which was where they ought to be performed ex debito Justitiæ; yet decreed ut supra.

(214.) Lord Antrim *versus* Duke de Buckingham. Jan. 1662.

J. C. 1. Cha. 2. Cas. 17. 1. Fol. 101. See Com. Rep. 396.

Lord Chancellor, Lord Bridgeman, Lord Hale.

Power executed per Feme Covert after Marriage.

Quare, these words, they not being in Fol. 101. where is the report of the case, & write them, the point being too clear as it there is cast in the Power before argument.

Power nude coupled with an Interest. Ante Case 101.

THE Lady Margaret of Antrim, Mother of the Defendant, being a Feme Sole seised of a Reversion after one Life, conveys the Land to the Use of herself for Life, the Remainder to in Tail, with Power for her being sole to make Leases for three Lives or 21 Years in Possession. The Feme marries, and then she and her Husband lease for 21 Years, in the Life of Tenant for Life, to commence from the Date, for Payment of Debts, &c. If this Lease per Baron and Feme were good. Bridgeman, This Power is not pursued; for by Marrying she hath put herself under the Power of her Husband; and there is a Difference between a Nude Power and a Power which flows from an Interest; for when a bare Power is given to a Feme by Will to sell Lands, although she marry, yet she may sell, and may sell to her Husband; but when she reserves a Power out of an Interest of her own, contra; but such Power ought to be expounded benignly at this Day, though formerly taken strictly. Second Point, being whether the Lease from that Date were good, was not resolved. Afterwards, Hale and the Chancellor concurring with Bridgeman, the Bill was dismissed.

(215.) Beddingfield *versus* Zouch.

Hide *versus* Petty; both in the Vacation before Trin. 15 Car. 2.

Chancellor, Baron Turner.

Sequestration upon Lands, when. Ante Case 142.

RESolved, That all Decrees in Chancery, as well for Personal as for Real Things, shall be executed by Sequestration; and both these Causes were brought into Parliament, and dismissed thence.

Sir George Binion *versus* Stone. (216.)
13 May 1663.

SIR George Binion bought a house for 2000 l. in the Name of his Son, then five Years of Age; Sir George's Estate being ordered to be sold for Delinquency, the Trustees for Sale sold it to Stone, to whom for 500 l. Sir George's Son and his Wife conveyed, making Oath they were not seised in Trust for Sir George. Sir George seeks Relief against Stone as for a Trust, and in Regard the Estate was sold as Sir George's, and that the Son was but five Years old at the Purchase, the Court presumed it a Trust, for which Sir George was relievable.

Lord Chancellor, Ch. Ba. Hale, J. Windham.

Presumptive Trust affects a Purchaser.

Ante Case 36, 151.

Post Case 222.

Humfreis *versus* Griffith. May 15 Car. 2. (217.)

APpeal from a Decree in the Grand Sessions of Montgomery; the Decree was, that an Infant should convey. Cur': We will reverse the Decree, but will not so far countenance the Jurisdiction of that Court, as to express it to be for the Infancy of the Defendant.

Lord Chancellor, Master of the Rolls.

Infant to convey.

Godscall *versus* Walker, Wall. (218.)
11 May 15 Car. 2.

JUdgment gotten against an Infant by Practice; ordered that it be referred to a Master to examine how much Money the Infant received. Note; The Guardian was Party to the Practice.

Consideration of a Judgment examined.

Viscountess Cranborne *versus* Delahay, Esq; (219.)

Sur Bill of Review; Demurrer. 21 May 15 Car. 2.

BILL was to reverse a Decree in May 1655, where the Duchess of Hamilton, the Defendant's late Wife, was Plaintiff, against the Lord Cranborne, the now Plaintiff's late Husband and other Defendants; Errors assigned,

Lord Chancellor, J. Windham.

were, (1) that the Duchess was in Truth a Feme Covert at the Time of the Decree had, as it appears by the now Defendants Answer in this Court, in another Cause; so there was no Cause in Court, the Cause being abated by her Marriage, wherein she was the Plaintiff.

Errors assigned.

(2.) That the Deed of the Earl of Dirlington, under which she claimed, being a Deed of Feoffment of the Friers of Guildford, was void, for the Estate thereof was in Trustees at that Time, and no Livery of Seisin was ever made on that Deed, and therefore ought not to be supported in Equity to the Disherison of the Plaintiff, Viz. countess Cranborne, Coheir at Law with the said Duchess to the said Earl of Dirlington.

To this the Defendant demurred, and for Cause shewed, that for ought appeared, the Decree was well grounded, and that the first Error was not Matter appearing in the Body of the said Decree but dehors, and yet was alledged as Error, and not as new Matter, and that the now Plaintiff could not take Advantage thereof, neither could any ever take Advantage of it but the Defendant, who had excepted to it; and it was but Matter of Abatement, and not in Point of Right, and after a Decree in Point of Right ought not to be admitted.

Matter dehors. New Matter.

Error in Nature of a Plea in Abatement, not assignable. Ante Case 35.

As to the first, Resolved, That a Decree made in Point of Right ought not to be reviewed on the Point of a dilatory Plea, which might have been pleaded in Abatement.

Trust of a Fee assigned.

Post Case 244. No Answer, if the Matter be intirely before the Court, upon a Demurrer.

To the second, Because the Earl of Dirlington was seised of a Trust, that the Deed, though in the Nature of a Feoffment, should pass the Trust without Livery and Seisin, for the Trust might have been declared by Parol; a fortiori in this Case. Then it was much insisted by the Plaintiff's Counsel, that the Defendants should be put to answer. But Resolved, That they should not answer, because by Possibility no other Matter can come before the Court than what is in the Demurrer, and so the Demurrer allowed.

Parry *versus* Brown. 26 May 1663. (220.)

RESolved, That where a Person hath Power to lease for 10 Years, and he leaseth for 20, it is good in Equity for 10; and so hath it been frequently resolved in this Court.

Lord Chancellor.

Post Case 296. Power to lease exceeded.

Sir Henry Bellasis & ux' *versus* Sir Wil. Erwin. (221.)

S.C. 1 Ch. Car. 22.

4 June 15 Car. 2. Upon a Plea.

SUIT was for a Portion of 8000 l. The Defendant pleaded it was given her, provided she married with Consent of A. and if not, then to have but 100 l. per Ann. Cur': This is but in Terrorem, but otherwise if the Portion had been limited to a third Person.

Lord Chancellor, Ch. Ba. Hale, J. Hide.

Proviso to defeat a Portion in Terrorem. Ante Case 17, 45.

Sir Gervase Scroope *versus* Sir Adrian Scroope. (222.)

Oct. 15 Car. 2. Upon a Plea.

BILL was to be relieved for the Manor of Gedney; the Plaintiff claimed by the Devise of Sir Gervase Scroope, Grandfather of the Plaintiff, Father of the Defendant; The Defendant pleads, that Sir Gervase bought the Manor in the Name of Sir Gervase and the Defendant. That the Money for the Purchase was raised by the Sale of Lands of Inheritance, which would have come to the Defendant, if not sold; and the Courts were held in both their Names, and he was never seised in Trust for Gervase, and now claimed the whole by Survivorship. Cur': This is a good Plea, unless it can be proved an express Trust, which could not be done but by a Replication, and there being no Replication, the Plea shall be taken true; for per Cur', the Purchase shall be intended an Advancement for the Son. 3 Cro. 550. and Sir Sidney Montgague's Case there, and Crisp versus Pratt. This Plea was reheard the 17th of Nov. 1663, and on Argument on both Sides allowed.

Judge Hide.

Ante Case 36, 151, 216 cont.

Father and Son Joint Purchasers.

Survivorship.

Nanny

(223.) Nanny *versus* Martyn. On Exceptions. 15 Oct. 15 Car. 2.

Judge Hide.

Baron and Feme.

Æquitas sequitur legem. Post Case 331, 354.

BAron and Feme have a Decree for Money in Droit le Feme, the Baron dies. Cur': The Feme shall have the Benefit of the Decree, as if it had been a Judgment at Law; and the Lord Chancellor afterwards, 18 Jan. 1665, declared he was of the same Opinion in this Case, and confirmed Judge Hide's Certificate.

(224.) Sir William Denny *versus* Filmer. 20 January 14 Car. 2.

Lord Chancellor, Ch. J. Bridgman.

Bill pro Confesso. Review.

ERROR upon a Bill of Review, for that the Decree was, that the Bill should be taken pro confesso. The Error was, that the Defendant was not brought in by Process of Contempt, and thereon had a Day assigned to Answer; on which the Defendant demurred, for that it appeared by the Decree, that he appeared by his Clerk on the Process of Contempt, and prayed farther Time to answer by his Counsel. Cur': Let the Defendant answer, saving the Benefit of his Demurrer till Hearing; and afterwards it was heard; and because of the Defendant's Appearance ut supra, and because afterwards he stood out all Process of Contempt, and would not answer, Resolved the Decree was well grounded.

(225.) Savile *versus* Darcy, about 1662.

Lord Chancellor.

Money paid before a Bill of Review.

DEcree for a great Sum of Money; Bill of Review brought, and new Matter assigned; the Rule of Court was pleaded that the Defendant ought first to pay the Money before the Bill brought. Cur': Let him give good Security for the Money, and we will dispense with the Rule; and the like between Baston and Byron, by Order of the House of Peers about 1662.

Dr. Collicott *versus* Hill & al'. Mich. 14 Car. 2. (226.)

DR. Collicott, having purchased the Fee of Church Lands, sold them with a general Covenant; the Church is restored, the Lands evicted; the Vendee brings Covenant, and recovers the Value of the Lands; the Plaintiff in his Bill, suggests that the said Covenant was gotten by Surprize, and that it was agreed only that he should covenant against his own Act; which appearing upon Proof, the Court ordered the Defendant to acknowledge Satisfaction on the Judgment. The like between Ferrar and Ferrar about six Months before.

Lord Chancellor, Master of the Rolls.

Averment against a general Covenant that it is particular.

Chute *versus* The Lady Dacres. 23 October 15 Car. 2. (227.)

ALledged that the Defendant was mistaken in her Answer, and desired she might amend the Matter, being inserted by Counsel after her Perusal; which was admitted by the Court; no Replication being filed, as it was in the Lord Coventry's Time inter Chettle versus Chettle.

Lord Chancellor, Master of the Rolls.

Answer amended.

Smith *versus* Oxinden. Trin. 15 Car. 2. (228.)

THE East-India Company sued their Factor for an Account of 1200 l. in Gold; he accounted for so much of it paid to the Emperor of East-India, for Custom; the Company insisted that none was paid, admitting which it was referred to Merchants, who ought to have the Benefit, in Case the Factor defrauded the Emperor of India of the Custom; and certified by the Merchants, that the Factor ought to have it, for if the Gold had been seised for Non-payment of Customs, the Factor had been chargeable, wherefore he shall have the Benefit. Vide Casum Proximum.

Lord Chancellor.

Merchant, Factor.

Customs stolen.

(229.) Botte *versus* Varde. 27 Oct. 15 Car. 2.

Lord Chancellor, Master of the Rolls.

Merchant, Factor.

Customs forfeit.

Exceptions to a Master's Report upon Exceptions to an Answer.

THE Bill was to discover whether the Factor had paid Customs in England; the Factor insisted, that as to that he need not answer, for the Advantage did redound to himself, if not paid. Exceptions taken to this, and the Master reports the Answer sufficient; but on Exceptions to the Master's Report Resolved, That the Factor should answer, and the Case was not like the foregoing Case, for here could be no Custom of Merchants grounded on a Fraud to the King. Vide Casum prox' preceden'.

(230.) Manning *versus* Burges. 26 Oct. 15 Car. 2.

Master of the Rolls.

Mortgage Money tendered, no Interest after.

IF a Mortgage be forfeited, and the Mortgagor tender the Money to the Mortgagee, and then prefer his Bill to redeem, the Mortgagee shall have no Interest from the Time of the Tender.

(231.) Tew *versus* Thackwell. 13 Oct. 15 Car. 2.

Lord Chancellor.

Apportionment of a Rent.

THE Plaintiff was Lessee of diverse Lands, whereon one intire Rent was reserved; a Township recovered Right of Common in Part of the Land, not being evict; the Lessee could not apportion the Rent at Law, so sues here for Apportionment, as there were Precedents that he might; but it being proved that the Land was still worth the Rent, the Bill was dismissed.

(232.) Rich *versus* Jaques. 29 Oct. 15 Car. 2.

Lord Chancellor.

Certiorari Bill.

RICH was Plaintiff, upon a Certiorari Bill, to remove a Cause out of the Mayor's Court, because his Witnesses lived out of the Jurisdiction of the Court; and now having examined his Witnesses here, the Defendant here (who is Plaintiff in the Mayor's Court) moved for a Procedendo; the Plaintiff here insisted that his Bill was of new Matter, and desired to be heard here, and so he was, and after Hearing the Cause dismissed.

Woolston Croft *versus* Long, & econtra. 6 Nov. 15 Car. 2. (233.)

Proportionable Payment to Creditors.

DEbtor in Bonds and ſingle Contracts aſſigns Land to ſell in Truſt for Payment of his Debts. Reſolved and Declared to be the conſtant Rule, that the Creditors ſhall have in Proportion, and not the Bonds to be firſt ſatisfied; ſo Legatees ſhall have equal Proportion pro rata, according to the Greatneſs or Smallneſs, for the Land is made Debtor, &c. but otherwiſe of Judgments, which affect Land by their own Strength and Nature.

Ante Caſe 54. Legatees.

Baker *verſus* Beamont. 6 Nov. 15 Car. 2. (234.)

Lord Chancellor.

Hab' Cor'.

ONE was in the Fleet for Breach of a Decree for not vacating a Judgment, and by Judgment in a feigned Action in the King's Bench gets himſelf turned over thither, and ſo had Liberty to go abroad, and got the Defendant in the Judgment taken in Execution, and on Habeas Corpus he was brought hither and recommitted to the Fleet, and confined to his Chamber; and a Habeas Corpus with a long Return to the Defendant in the Judgment granted.

More *verſus* Mayhow. 10 Nov. 15 Car. 2. (235.)

Lord Chancellor, J. Tyrrell.

Notice of Truſt after Articles and before Conveyance.

THE Plaintiff's Bill was to be relieved upon a Truſt, and charged the Defendant with Notice, and that yet he had gotten a Conveyance, and yet on or before the Conveyance had Notice. Defendant, by Way of Anſwer, denying that he had Notice at the Time of Purchaſe, for Plea ſaith he is a Purchaſer on a Valuable Conſideration. Obj. 1. He ought to have expreſſed the Money given, for 5 s. is a Valuable Conſideration, but not Equitable. Cur': The Plea is good as to that. 2. The Plea depends on the Anſwer, that he had no Notice at the Time of the Purchaſe, which is not a ſufficient Denial of Notice, for Purchaſe is equivocate, and may mean the Articles or Agreement of Purchaſe, and ſo he might have Notice at the Time of the Conveyance executed. Cur': It hath been always ruled, that if the

the Purchaſer after Articles have Notice before, or at the Executing of the Conveyance, it ſhall defeat his Title, and therefore Reſolved that Plea is not good.

(236.) Garfoot *verſus* Garfoot. 10 Nov. 15 Car. 2.

On a Demurrer.

Executor dies before Sale, the Heir ſhall ſell.

LANDS deviſed to the Feme for Life, afterwards to be ſold by Executors for young Childrens Portions; the Executors die, the Feme dies, the younger Children prefer their Bill againſt the Heir; he demurs, becauſe but an Authority in the Executors, which is now dead with them, and the Demurrer over-ruled.

(237.) Churchill *verſus* Grove & al'. 14 Nov. 15 Car. 2.

On a Plea.

Lord Chancellor, Baron Turner.

Cogniſee of an eigne Statute upon account takes Part of the Extent in Satisfaction without Notice of a puiſne Judgment.

Purchaſe.

THE Plaintiff, having a Judgment and a Mortgage, exhibits his Bill againſt one that had a precedent Statute, and againſt the Mortgagor, to diſcover what was due upon the Statute, and upon Payment to ſet the Statute aſide. The Cognizee pleaded, that he having extended the Recognizance, came to an Account with the Mortgagor, and there being 3000 l. due, he purchaſed Part of the extended Lands for the ſame, and aſſigned the other Part to the Mortgagor, and this without Notice of the Plaintiff's Title, and was a Purchaſer for a Valuable Conſideration; and alſo pleaded that the Plaintiff had taken the Conuſee of the Judgment in Execution thereon, and therefore the Lands could not be liable during his Life.

On the Plaintiff's Part, as to the firſt Point, it was inſiſted, that it did not appear that the Defendant was a Purchaſer, there being no new Money paid on the Executing of the Conveyance, but that coming in for the Money formerly due, it was no Purchaſe; that it was common in Equity for him, that had the ſubſequent Judgment, to be relieved againſt him that had the precedent Statute, upon Payment of what was due; that therefore the Defendant's pretended Purchaſe being ſubſequent

to the Plaintiff's Judgments, ought not to affect him; that the Plaintiff's Judgments were on Record, so every one ought to take Notice of them at his Peril.

Purchase protected by eigne Incumbrances Ante Case 7.

The Defendant's Counsel insisted, that it was a Purchase, that the Defendant had parted with Part of the extended Lands, which were as Valuable as Money, that it was the constant Justice of this Court, that if a Purchaser bona fide did buy in any eigne Statute or Judgment, and there was a Judgment mesne between that and his Title by Purchase, of which he had no Notice at his Purchase, that he should protect his Purchase by the eigne Incumbrances so bought in; and that though at Law a Purchaser must at his Peril take Notice of a Judgment because it affects the Land, yet when one prays the Relief of this Court to have the Benefit of a Judgment, he shall never have that Relief against a Purchaser bona fide, unless he can prove express Notice in the Purchaser of the said Judgment when he purchased; and upon this Point the Plea was allowed; but as for the other Point, that the Plaintiff had taken the Conusee of the Judgment in Execution, it was confidently affirmed, and not denied, that it was no Plea, because the Land would become chargeable after the Death of him in Execution, and that therefore the Defendant ought to answer and discover.

Party in Execution. Bill lies for Discovery.

Williams *versus* Arthur. 24 Nov. 15 Car. 2. (238.)

Plea and Demurrer.

Bill of Revivor on Sci' fa'.

A Decretal Order was pronounced in 57, after it had depended on Account for three Years; the Decree was drawn up reciting the first Order, but Part of the Matter there is omitted in the Decretal Part of the Decree; the Decree was signed and inrolled, the Defendant died, and Sci' Fa' was sued to revive, but the Plaintiff discovering the Omission, and that he could not have Remedy that Way, nor could mend the Decree as defective by Surprize (the Defendant being Dead) upon any Motion in Court, he exhibits his Bill of Revivor, to revive so much as was omitted, and in Truth the Words of the Bill extended to revive the whole Decree. It was pleaded that the Decree being Inrolled, a Bill of Revivor did not lie, but a Sci' Fa' ordered, and that the Plea be over-ruled.

(239.) Curtis *verſus* Smallridge. 26 Jan. 1 Car. 2.

Trial at Law ſet aſide.

THE Defendant's Wife had pawned her Husband's Plate, and the Husband recovered 1500 l. in Trover; the Plaintiff exhibited his Bill here, and it appear'd that the Pawning was by the Husband's Conſent, and he received the Money.

Cur': Becauſe it doth not appear that by any Accident the Defendant was hindred of his Witneſſes at the Trial, we will not order a new Trial; and taken for a Rule, that the Court will not ſet aſide a Trial at Law, for any Matter which might be made uſe of at the Trial, and here nothing appears but the Defendant at the Trial might have produced this Evidence, and we will not help his Negligence; ſo there can be no Bill of Review for any Matter which might have been made Uſe of in the firſt Cauſe, or for any Matter ſubſequent to the Decree, as the Plaintiff's Confeſſion.

Bill of Review for what Matter.

Ante Caſe 35. Poſt Caſe 249.

(240.) Seaborne *verſus* Blackſton. 26 Nov. 1663. 15 Car. 2.

Maſter of the Rolls.

THE Wife received Money due upon a Bond to her Husband, ſhe uſually received and paid the Money; he got Judgment on the Bond. Ordered that he acknowledge Satisfaction.

Baron conclude per Receipt del feme.

(241.) Randall *verſus* Richford. 28 Jan. 15 Car. 2.

Witneſs miſtaken re-examined.

A Witneſs alledged he had miſtaken himſelf at a Commiſſion, the Commiſſion being returned, he came to London and made Oath that he was ſurprized; a Special Commiſſion iſſued to re-examine this Witneſs, which was done accordingly; but this Special Commiſſion was ſuppreſſed by Motion, by Advice with the Maſter of the Rolls with the ſix Clerks, as contrary to the Courſe of the Court.

Read *versus* Hanby. 18 Feb. 15 Car. 2. On a Demurrer. (242.)

ONE seised of the Manor of W. worth 110 l. per Ann. and of a Farm in W. worth 250 l. per Ann. articles to sell the Manor; and if that the Manor were not worth 110 l. per Ann. he would make it up with the Farm-Lands. The Plaintiff got a Decree upon these Articles, which was so penned that the whole Farm was by general Words included. The Defendant exhibited a Bill to have the Decree explained, on which the Defendant demurred. It was insisted, that no Bill of Review did lie, because nothing could appear to the Court on the Body of this Decree to alter it. On the other Side it was insisted, that it ought not to be by Original Bill, because it would tend to overthrow all Decrees, and hinder their Execution and diminish their Force, and that the Way must be to set forth the Matter on Interrogatories, upon the Writ of Execution: To which it was answered by the Plaintiff's Counsel, that the Defendant in the first Decree could not set forth any such Matter in the Interrogatories, but only answer to the Contempts, admitting the Words of the Decree. Also the Plaintiff insisted that the Demurrer confessed the Matter of the Bill; but the Court allowed the Demurrer good.

Lord Chancellor, Baron Turner.

Original Bill to explain a Decree ne gist.

Review.

Demurer, Confession of the Bill. But here the Matter was against the Record.

Beautry & ux' *versus* Ibson & al'. 4 May 16 Car. 2. (243.)

IBson possessed of a Church Lease for Years, buys the Fee of the Trustees for Sale, and then covenants to stand seised, &c. for his Wife for Life; his Wife releases the Personal Estate to the Executors; the Church is restored, and she sues here to have the Term against the Release as long as she lived. Cur': The Lease was to attend the Inheritance, and shall go where the Inheritance was to go, viz. to the Wife, &c.

2. As to the Release it appears by the Proof, that it was not intended the Term should pass, and therefore nothing of that shall be included to go to the Executor, and the Release shall extend no farther than the Agreement which begot it.

Master of the Rolls.

Ante Case 77. Lease to attend the Inheritance.

Release governed by the Agreement.

Good-

(244.) Goodrick *verſus* Brown. 11 May 16 Car. 2.

Lord Chancellor, Maſter of the Rolls.

Ante Caſe 219.

Fine governed by a Decree.

Fine and Recovery of a Truſt.

BY a Decree a Fine levied to a particular Purpoſe ſhall operate only as to that particular Purpoſe in Equity, though in Law it would operate farther. 2. That a Fine and Recovery of Ceſtuy que Truſt ſhould operate as ſtrongly as an Eſtate at Law, and to the ſame Purpoſe, if it were on any Conſideration. Judge Windham doubted; for otherwiſe, he ſaid, this Court would not give Relief. 3. That one being Tenant for Life by Conveyance, and afterwards the Reverſioner and Anceſtor, in Conſideration of Blood, &c. articles to ſettle the Eſtate on him in Tail, ſo that in Equity he had a Truſt in Tail in the Eſtate; the Court allowed of this Recovery, though but Tenant for Life at that Time in Law; yet it was objected that he ought firſt to have exhibited his Bill, and have had his Eſtate decreed to him in Tail, according to the Articles; to which the Court anſwered not, but decreed ut ſupra.

(245.) Freake *verſus* Horſeley. 12 May 16 Car. 2.

On a Demurrer.

Lord Chancellor, J. Brown.

Mortgage Money.
Heir.
Executor.
Ante Caſe 57.

THE Heir of the Mortgagee exhibited a Bill to have the Mortgagor redeem, or elſe be foreclosed. The Defendant demurred, becauſe the Executor, who might have Title to the Money, was not Party; and the Demurrer allowed.

(246.) Ward *verſus* Lake. 12 May 16 Car. 2.

Lord Chancellor, J. Brown.

Subpœna Sci Fa'.
Heir.
Executor.

DEmurrer to a Subpœna in Nature of a Sci' Fa', becauſe the Plaintiff therein did not alledge himſelf Heir or Executor to him that had the Decree. Reſolved the Demurrer is naught, and never any ſuch before, for the Subpœna is no Record, nor any where filed; but if there be any Defect in the Order for the Subpœna, Cauſe muſt be ſhewn at the Return of the Writ, but the Order mentioned the Plaintiff to be both Heir and Executor.

Jackſon *verſus* Eyre. 23 Maii 16 Car. 2. (247.)

THE Defendant had a Decree for Money; the Plaintiff by Bill of Review reverſed this Decree, and the Money decreed to the Plaintiff. Cur': On Search of Precedents, the Defendant ſhall not pay Damage for this Money.

Lord Chancellor.

Decree reverſed, no Damages.

Nicholſon *verſus* Sherman. 23 Jun. 16 Car. 2. (248.)

ONE exhibits a Bill againſt an Executor and a Stranger, ſetting forth that the Teſtator's Eſtate came to both their Hands, and that the Teſtator had given him a Legacy, &c. The Stranger demurs, becauſe the Executor is only ſuable. The Court over-ruled the Demurrer; for whoſoever gets any of the Teſtator's Eſtate into his Hands, is anſwerable for the Legacies; and in Trin. Term 65 this Cauſe was heard and decreed.

Lord Chancellor, Baron Turner.

Legacies payable by Executor de ſon Tort.

Williams *verſus* Owen and Arthur. 23 June 16 Car. 2. (249.)

THE Defendant anſwered the Bill of Review, but ſo as that ſome Matter in his Anſwer would bring into Examination ſome Part of the Decree, as it was ſigned and inrolled; on which Anſwer, as to that Part, Serjeant Fountaine drew a Demurrer, becauſe this would tend to Perjury and Infiniteneſs, to re-examine Things examined and decreed, of which Opinion the Court was; but as well the Defendant's Counſel as the Court ſaid there could be no Demurrer upon an Anſwer in Equity. Serjeant Glynn for the Plaintiff ſaid, he had known it; the Court made an Order that there ſhould be no Examination of that which had been examined, and that was the Rule.

Demurrer to an Anſwer.

Ante Caſe 239.

(250.) Belton *verſus* Anne. 16 Car. 2.

Lord Chancellor, Maſter of the Rolls.

Judgment vacated.

Act of Oblivion.

DEBT extinct by the Act of Oblivion; the Debtee gets Judgment; the Defendant ſues here, and the Judgment decreed to be vacated; and the Chancellor ſaid this Court might relieve on that Act, as well as any other Court.

(251.) Combes *verſus* Proud. 16 Jun. 16 Car. 2.

Demurrer.

Lord Chancellor, Baron Rainsford.

Poſt Caſe 401.

Review. What Errors aſſigned.

THE Bill was a Bill of Review, and in drawing up the Decretal Order, the Matter on which the Decree was, declared to be proved, and the Caſe ſtated far different from the Fact; therefore the Errors aſſigned were, that the Decree was grounded on Matters not proved, and inſtanced in Particular, that the Matters mentioned in the Decree to be proved, were not proved; this Demurrer was general, that the Errors aſſigned were not Errors in Law, and were but Miſjudgments, &c. And on Debate it was declared, that on a Bill of Review the Cauſe of Review muſt ariſe and appear upon the Caſe, as ſtated in the Decree, and that the Fact muſt be admitted as then ſtated, and that though the Fact, whereon the Court gave Judgment, were miſtaken, yet there is no Ground of a Bill of Review, but the Fact in this Caſe muſt be admitted true, and the Decree is Matter of Record, and can be tried only by the Record; but in miſtaking the Fact, the proper Courſe had been to have gotten the Cauſe reheard before the Decree had been ſigned and inrolled.

(252.) Glover *verſus* Portington & al'. 14 May 16 Car. 2.

Maſter of the Rolls.

Voluntary Gift on Condition.

Forfeiture.

MOrtgagee by Will remits Part of the Mortgage-Money and all Intereſt, provided the Reſt be paid within three Years, or if the Reſt be paid in three Years; the Mortgagor not paying in three Years loſeth the Benefit of that Bequeſt, for the Gift was voluntary; and in

this Case upon Demurrer it was resolved, that if a Man hath less decreed for him than he would have, he shall not bring a Bill of Review. But a Bill of Review lies only for him against whom the Decree or Dismission is; and after long Debate, the Demurrer was therefore allowed. And Note; In the Case supra the Mortgagor suing to redeem, was decreed to pay the whole Money causa qua supra, and the Decree confirmed on a Rehearing; and Fountaine, of Counsel with the Plaintiff Mortgagor, agreed it to be so.

Review, who may bring it.

Proud *versus* Combes, supra Case 251. (253.)

ACcount stated is a good Plea, but if there be any Agreement to rectify Mistakes, it shall not conclude, though under Hand and Seal.

Master of the Rolls.

Ante Case 398.

Ramm *versus* Cartwright. 5 Nov. 16 Car. 2. (254.)

A Voluntary Deed found to be fraudulent against a Mortgagee, yet the Grantee in the said Deed may afterwards sue for Redemption, for it is good against the Grantor and his Heirs, and he shall have the Equity of Redemption.

Master of the Rolls.

Fraudulent Deed good against the Grantor.

Kennesby *versus* Parrett. 15 Dec. 16 Car. 2. (255.)

Demurrer.

LEgatees of Portions at 21 Years of Age, had Maintenance in the mean Time allowed them on Suit here. J. Archer in Curia.

Legatees Maintenance. Ante Case 50, 65.

Dreke *versus* Mayor of Exon. Feb. 17 Car. 2. (256.)

LEASE with Covenants to renew; the Lessee becomes Bankrupt, the Commissioners assign to the Plaintiff, who sues the Lessor to renew; and resolved that he should. Serjeant Nudigate affirmed that the Commissioners might assign the Equity of Redemption of a Mortgage, quia de hoc the Statute speaks only of Conditions, and not Conditions forfeited.

Lord Chancellor, J. Windham. Baron Turner.

Commissioners of Bankrupts assign Covenants in Equity.

Baker

(257.) Baker *versus* Shelbury. 10 Feb. 1664.

Apprentice may force his Master to sue, &c.

IT is usual, when an Apprentice is out of his Time, to prefer his Bill, to force his Master to sue his Covenants within a Year, or be foreclosed. Semble in auters Cases, for Witnesses may die.

(258.) Terwit *versus* Gresham.

L.C. 1. Cha. Cas. 73. more fully.

Lord Chancellor, Baron Turner.

Depositions in a former Cause between other Parties read.

ORdered upon a long Debate, that the Depositions of Witnesses taken in a Cause 30 Years since, about the same Matters being Incumbrances and Damnifications, should be made Use of in this Cause, Witnesses being Dead, though that Suit were between other Parties from whom these claim not; and the Case between Trinity Hall and Doctors Commons cited, and between Charlton and Vaughan.

(259.) Sir Thomas Bennett, Sir William Brown *versus* Box & al'.

L.C. 1. Cha. Cas. 12. See L. Nottingham's Mss. Book of Equity chap. 14. pl. 6.

Assets against Heir.

THIS Case concerneth Assets in Equity, by which it appeareth that the Ancestor's Incumbrances on it were so great, the Revenue would not pay the Interest; for which Reason resolved, no Assets in Equity.

(260.) Smith *versus* Pemberton. 30 May 17 Car. 2.

Interest turned into Principal on Mortgage. Ante Case 34, 180.

THE Mortgagee had assigned for Principal and Interest; the Mortgagor came to redeem. The Question was, If what the Assignee paid should be all taken for Principal? Resolved, That all which he really paid and was due, should be Principal; but the Account between the Mortgagee and the Assignee should not conclude the Mortgagor, and therefore referred to a Master.

DE
Term. S. Mich.
1692.
In Curia Cancellariæ.

Duffield *versus* Smith. (261.)

DUffield upon Marriage ſettled his Lands to the Uſe of himſelf for Life, then to his Wife for Life, Remainder to the firſt Son and the Heirs Male of his Body, &c. and for Default of Iſſue Male, Remainder to the Iſſue Female, until the Heirs or Aſſigns of Duffield ſhould pay them 3000 l. Remainder to his own right Heirs; and afterwards he and his Wife die, leaving Iſſue a Son and a Daughter; the Son dying without Iſſue Male gave his Siſter the Value of 5000 l. and ſettled the Land upon the Plaintiff for Life, with Remainders over; the Defendant, who married the Daughter, preferred his Bill for this 3000 l. and it appearing to the Court, that they had an Eſtate at Law by the Limitations in the Settlement, the Bill was diſmiſſed, and thereupon they brought an Ejectment, and recovered at Law; and now the Plaintiff prefers his Bill to be relieved, upon a Preſumption that this 5000 l. was given in Satisfaction of the 3000 l. and ſhould be ſo taken. And Trevor and Hutchins were of Opinion, that it ſhould be ſo preſumed, and that the Plaintiff ought to be relieved; for that the Son, after he had given this 5000 l. and diſpoſed of the Eſtate, and given the Plaintiff but an Eſtate for Life in it, could never intend that he ſhould raiſe the 3000 l. But Rawlinſon was of another Opinion, in regard that no Intendment.

such Intent did appear, and here the Defendant was Heir at Law; and though sometimes such Intendments had been taken here in Favour of the Heir at Law, and when the Circumstances of a Family have been very mean and low; yet here it was against the Heir at Law, who also had the Estate in Law in them; and in many Cases where this Court will not relieve where the Party hath no Estate in Law, yet where the Party hath the Estate at Law, it will not take it from him.

(262.) Alcock *versus* Ellen. 26 Oct.

Ante Case 116. A Man devised a Term for Years to his Daughter and her Children, (she then having three Children) and also to such other Children as she should have, and the Children of those Children, she having other Children afterwards. But the Question was, Whether they should have any Shares? And it was held that the Woman and her three Children took jointly each a fourth Part, and that the after-born Children took nothing; and that these Words were Words of Limitation and not of Purchase, and 'tis as much for the Wife's Part, as though it had been given to her and the Heirs of her Body.

(263.) Duke of Southampton *versus* Sir Cæsar Cramborne.

SIR Henry Wood having one Daughter, and having a Desire to advance his Daughter in Marriage to the said Duke, makes a Settlement of his Estate (reciting the intended Marriage, &c.) and limits it to the Use of himself for Life, Remainder to the Use of J. S. and the Defendant, and their Heirs; to the Intent that in Case the Plaintiff should be married to his said Daughter after the Age of sixteen, and that they should have Issue Male between them, that then the said Trustees and their Heirs should stand seised of the Premisses, in Trust for the Plaintiff during his Life, and after his Decease, in Trust for his said Daughter for her Life, and after in Trust for such Issue in Tail, &c. The said Plaintiff was married to the said Daughter before her Age of fourteen, but she lived till she was above the Age of sixteen, and then died without Issue; and the Plaintiff preferred his

Will to have this Trust executed to him for his Life; and the only Question was, Whether he was intitled to this Estate for Life? And it was held, that although she was married before the Age of sixteen, yet in as much as she lived till after the Age of sixteen, she might properly enough be said to be married after the Age of sixteen, and so it was held in the Lord Salisbury's Case, and affirmed in the House of Lords. They all held that although there was no Issue of that Marriage, yet the Plaintiff was intitled for his Life, for that it should be taken reddendo singula singulis, and the having of Issue should be no Condition precedent to his Trust for Life, but should refer to that Limitation of the Trust to the Issue, for that a Trust should be expounded by the same Rules, as a Will, or as Articles of Agreement, which need not that precise Form of Words as a Limitation of an Estate at Law; as an Agreement to convey an Estate to J. S. for ever will carry the Fee-simple. And Trevor said, that if it were the Limitation of an Use at Law, it would be sufficient to create an Estate for Life, the Intent of the Party so plainly appearing as it doth in this Case. This Cause being afterwards heard in the House of Lords, the Decree was reversed.

Grubb *versus* Woodhouse. (264.)

A Mortgage was made in 1642 of Lands then of the Value of 9 l. per Ann. and Money being at eight per Cent. the Mortgagee was to enter presently, and pay the Mortgagor 20 l. per Ann. The Mortgagees have been in Possession ever since, and paid the 20 l. per Ann. The Plaintiff, being the Grandson and Heir of the Mortgagor, preferred his Bill against the Defendant, Grandson of the Mortgagee, to redeem; and it being heard at the Rolls the Bill was dismissed, by Reason of the Length of Time, the Mortgagee having been in Possession 50 Years. But upon Appeal to the Lords Commissioners, the Cause being heard this Term, they decreed a Redemption, by Reason of the Continuance of the Payment of the 20 l. per Ann. which was all one as the paying of Interest, being pursuant to the first Agreement. And if Interest be paid constantly upon a Mortgage, the Antiquity of it is no Objection against the Redemption of it; but it was ordered that there should be no Account of Profits, but that

Mortgage redeemed after 50 Years.

that they should be set against the Interest; and the Mortgagee had his Costs.

(265.) Conway *versus* Stroude.

Executor de son Tort.

A Creditor of J. S. deceased, prefers his Bill against the Defendant, for a Discovery of the Estate of J. S. which is supposed to be in his Hands. The Defendant demurs, because there is no Executor or Administrator of J. S. Plaintiff or Defendant, and held to be a good Demurrer, because if no Person will administer, the Plaintiff as Creditor may; and it is necessary that the Executor or Administrator should be Party, because it may be they may shew how the Plaintiff's Demand is discharged.

(266.) Lady Gaynsborough's Case.

Lords Commissioners.

Devise.

Heir and Executor.

THE Lord Gainsborough devised several Legacies, and charged them upon his Rutlandshire Lands, and likewise charged his Land with the Payment of his Debts, and made his Lady Executrix, but did not devise to her all his Personal Estate in express Words; but it was in Proof, that he declared that his Lady should have his Personal Estate, by five Witnesses of Reputation; and my Lord found fault with the Will after it was Writ, because the Personal Estate was not given to her, and that Mr. Milner, who writ the Will, told him, that being made Executrix she had it by Law, without any express Gift.

Averment to explain.

1. In this Case it was agreed, that (when there is no Intention of the Testator appearing to the contrary) the Personal Estate shall in the first Place be applied to the Payment of Debts and Legacies, as far as it will extend in Aid of the Real Estate and for the Benefit of the Heir, whether he be Hæres natus or factus, altho' it is but of late Times that the Hæres factus had that Privilege, but the Course of the Court of late hath been so.

Post Case 313.

2. Where the Will concerns Lands only, there no Averment shall be taken by any Proof whatsoever by Parol, to supply the Defects of it, which varies from the Sense of the Will in Writing; but so far as concerns a Personal

Eſtate only; ſuch Averments may be made, becauſe a Nuncupative Will is good to diſpoſe of a Perſonal Eſtate.

3. It was held in this Caſe by all three of the Lords Commiſſioners, that the Lady ought to have the Perſonal Eſtate exempt from Debts and Legacies, becauſe the written Will chargeth all Debts and Legacies upon the Lands, for there were ſeven Legacies given, and in every Paragraph the Concluſion is, to be paid out of his Lands; and although Parol Proofs ſhall not be admitted in Contradiction of the Will, yet when they go only in Confirmation and Corroboration of what appears to be the Teſtator's Intent by his written Will, there they may be made Uſe of to fortify it. Poſt Caſe 292, 297.

Trevor ſaid there was but one Caſe which made any Manner of Doubt in him, and that was the Caſe of my Lady Middleton and Sir Thomas Middleton who was hæres factus, where Sir —— Middleton deviſed his Eſtate to Truſtees, to raiſe Money for the Payment of his Debts, and after the Debts paid, then to Sir Thomas Middleton, and yet the Lord Chancellor Jefferies decreed the Perſonal Eſtate to be firſt applied, and that Decree yet ſtands, but he thought it might be erroneous in ſome Things. Poſt Caſe 278. b.

The Decree was, That the Lands ſhould ſtand charged with the Legacies, and in Caſe my Lady was ſued for any of the Debts (as ſhe might be by the Creditors) ſhe was to be reimburſed out of the Lands.

Welch *verſus* Welch. (267.)

Diſtribution.

UPON the Statute of Diſtribution it was held and agreed, That where it is ſaid in the Statute, That there ſhall be no Repreſentation amongſt Collaterals beyond Brothers and Siſters Children, it is intended of Brothers and Siſters to the Inteſtate only, * for if the Inteſtate hath no lineal Relations, nor Brothers nor Siſters, but (for the Purpoſe) three Uncles, and one of them dies before the Inteſtate, leaving Iſſue, it is held that Iſſue ſhall not come in by Way of Repreſentation, for though the Uncles were Brothers amongſt themſelves, yet not being Brothers to the Inteſtate, there can be no Repreſentative.

* It was ſaid to be ſo reſolved in C. B. and K. B.

Amongſt Lineals there may be Repreſentatives by Grandchildren, and great Grandchildren, without Reſtriction, becauſe the Reſtriction is only among Collaterals, and there it goes only to Children.

If the Intestate had three Brothers, and two of them being dead, and one of them left three or more Children, and the other one Child only, and the other Brother be living, the Share of the one Child shall be equal to the Share of all the three of the other Brother, because there they claim as Representatives; but if all the three Brothers die before the Intestate, and one leaves one Child and another two, and another six, there each of the six Children shall have a Share equal to the one Child, because there all the Brothers being dead none of them claim as Representatives, but all claim as next of Kin, and therefore shall all take equally.

See my references in Vernon. 251.

(268.) Norton *versus* Mr. Barker.

Distribution. Colonel Norton having Issue Mrs. Whitehead and two other Children, Mrs. Whitehead had Issue Mrs. Barker and two other Children, and upon her Marriage with Mr. Barker, he gave her 500 l.

Colonel Norton being Dead Intestate, the Question was, Whether this 500 l. should be accounted as Part of her Share, because the Words of the Act being, where any Child is advanced, and here she was the Grandchild?

Held by the Lords Commissioners, Rawlinson and Hutchins, that this should be reckoned as Part of her Share.

(268. b.) IT was held that if the Heir hath any Advancement by Money or Personal Estate, that it shall be reckoned as Part of his Share, because the Statute is, that he shall have a full Share, notwithstanding any Land which he shall have by Descent or otherwise from the Intestate.

In Colonel Norton's Case above, it was held, that he having bought his Son a Pensioner's Place in King James's Time, for 500 l. which upon King James Abdication was lost, so that he had no Benefit by it, yet this was ruled to be an Advancement, and to be reckoned as Part of his Share.

DE
Term. S. Mich.
1693.
In Curia Cancellariæ.

Chaffin *versus* Gawden. (269.)

A Bill was preferred by the Lord of a Manor against the Tenants for Certum Letæ. The Equity of the Bill was to prevent Multiplicity of Suits, in regard it is a Sum of Money payable to the Lord of the Leet, of which every Baron that owes Suit and Service to the Leet, is to pay a Part according to the Custom of the Place; so that to bring an Action against every Contributor for every little Sum would cause Multiplicity of Actions; and thereupon it was decreed for the Plaintiff, unless they would go to Trial at Law upon the Usage, where the Issue was directed to be upon the Solet, and not upon the Debet; for it was said, if the Issue be upon the Debet, the Right must be made out at the Trial, but upon the Solet it is sufficient to prove the Usage; and so it was directed in Dr. Hinckley's Case of Worcestershire for a Pension of 4 l. per Ann. issuing out of the Estate of Mr. Jolly. Lord Keeper. Certum Letæ.

It was said in this Case, that although a Distress is incident to Amercements in a Court-Leet; yet for any Duty which the Lord intitles himself to by Custom, he cannot distrain unless the Custom be also to distrain for it. 1 Vent. 105. Vide 6 Co. Bullen's Case, 11 Co. Godfrey's Case.

Certum

Certum Letæ is paid to the Lord, in Consideration of the Charge in obtaining the Court-Leet, which saves the Attendance of the Resiants from the Turn, &c.

(269. b.) IF a Man by his Will deviseth his Lands to J. S. and doth desire that the said J. S. should pay his Debts, or if it be the said J. S. paying his Debts, or if immediately after the Devise of his Lands, he doth appoint or desire that his Debts should be paid, or if he useth any Expression in the Will, whereby it appears that he had any Intent to charge his Lands with his Debts, in such Case his Lands will stand charged.

Lands charged with Debts.

Assets.

But in the Case at Bar, where the Testator had, in the beginning of his Will, said that he desired that all his just Debts should be paid; and afterwards in the said Will he gave several Legacies, and devised Lands; it was held that this Devisee was not charged with the Payment of the Debts; for if that should be so, the Debts of every Testator would be charged upon his Lands, for there are but few Wills but have some such Expression, whereby the Testator desires his Debts to be paid.

(270.) Bowen *versus* Whitmore. Dec. 1693.

At the Rolls.

Forfeiture by Condition broken.

BILL was to be relieved against an Entry made by the Defendant upon the Plaintiff, who was his Lessee, for a Forfeiture by Breach of Conditions in the Lease, in which Lease there were three Conditions, viz. Non-payment of Rent, Wilful Waste, and Assigning without Licence. It was insisted by the Defendant's Counsel, that upon an Entry for Non-payment of Rent, this Court did ordinarily relieve, because it could put the Lessor in the same Condition he was in, by ordering the Payment of the Rent and his Charges, &c. but where Waste was committed by cutting down great Trees, there it was impossible to set them up again, and to put the Lessor in the same Plight he was in before, and therefore ought not to give Relief; but notwithstanding the Plaintiff was relieved, and referred to a Master to inquire what the Defendant was damnified by the felling of Trees, and upon Payment of the Arrears of Rent, Damages and Charges, and giving Security for Payment of his Rent, the Defendant was ordered to make a new Lease.

Ducheſs of Albemarle, Monk, *verſus* Earl of Bath. 12 Dec. 1693. (271.)

S. C. ante. 121. 3. Cha. Cas. 55. 2. Chan. Rep. 417.

Revocation. Ante Caſe 137.

THE Duke of Albemarle in 1675 made his Will, and thereby gave great Part of his Eſtate to the Earl of Bath.

In 1681 he makes a Deed of Settlement, wherein he mentions his Intent to confirm his ſaid Will, but in limiting of his Eſtate, varies in many Particulars from it, but ſettles the greateſt Part of his Eſtate upon the Earl of Bath, and makes this Settlement, with a Power of Revocation by any Deed or Writing to be executed in the Preſence of ſix or more credible Witneſſes, three whereof to be Peers of the Realm.

In 1687 he makes another Will, atteſted by three Witneſſes, whereby he revokes this Settlement, and thereby gives a great Part of his Eſtate to Mr. Monk the Plaintiff.

The Plaintiff's Bill was to ſet aſide the Settlement and to ſet up the laſt Will, whereby he claims, and inſiſts, that although this might not be a Revocation in Strictneſs of Law, by Reaſon the Circumſtances were not purſued, neither in the Number nor Quality of the Witneſſes, yet this Will was made with great Deliberation, as it was in Proof that it was ſix Months after the Inſtructions given for the Draught before it was compleated; and that my Lord Chief Juſtice Pollexfen's Opinion was taken, ſo that it appeared it was a Thing very well conſidered and deliberated upon; and therefore, although the Circumſtances preſcribed were not ſtrictly purſued, yet theſe being only to prevent a Surpriſe, and it appearing evidently that there was none in this Caſe, this Revocation ought to be as effectual in Law as though all Circumſtances had been obſerved, as was inſiſted by the Plaintiff's Counſel.

This Cauſe was heard by the Lord Keeper, aſſiſted by the two Chief Juſtices and Baron Powell, who appointed this Day to give Judgment.

Baron Powell and Chief Juſtice Treby gave their Opinions that the Settlement, for all that appeared to them, was a good Settlement, and not revoked by the latter Will, neither in Law nor Equity.

Five Things were insisted upon to avoid this Settlement.

1. That it was obtained by Surprize.

2. That it was concealed or forgotten.

3. That it was attendant upon a Will, and so revocable in its Nature.

4. The Power of Revocation.

5. The great Advice and Deliberation taken in making this last Will.

Ad primam, It was alledged to be obtained by Surprise, because it was not read to him, neither did he read or peruse it at the Time he sealed it.

To that it was answered by the Judges, that if a Man doth seal a Deed and not read it, that is no sufficient Reason to set it aside, for it may be, he had perused the Draught, or given Instructions and perused them; but if this should be a Reason to set aside Deeds, it would be of ill Consequence. But here it appeared that this Settlement was made pursuant to his Inclinations, it being in Proof that he had a continued Kindness for the Earl of Bath.

Ad secundam, It was alledged that it was concealed or forgotten, or else he might as easily have had six Witnesses as three.

To that it was answered, that it doth not appear that it was forgotten, but if it had, that would not have made it void, and it may be, the Duke did purposely seal this Will in the Presence of three Witnesses only, never intending that it should be of any avail, but might be importuned to the doing of it, and might for Quietness sake execute it, and though it appears by Proof that he was a long Time deliberating about it, for six Months or more, it doth not appear whether he was then considering how to execute it effectually, or doubting whether he should execute it at all, and for Concealment it doth not appear here was any.

Fraud. And for the Case of Mr. Charles Clare, it was thought hard, although that Case was, He had a Statute against a Man who mortgages his Estate, he was Privy to the Mortgage, and ingrossed it, and never told the Mortgagee of his Statute; and it was held a Fraud, and the Mortgage was thereupon preferred in this Court.

Ad tertiam, It was alledged that this Settlement confirming the Will, was attendant upon it, and so in its own Nature revocable, and cited Dyer 49, 312, 317. But to

that it was answered, that those Cases did not come up to this; for in Dyer 49. there the Will was revoked, and not the Deed, and there is no Question of that, because a Will is always revocable in its own Nature; but in no Case a Deed is revocable without a Power. Hob. 349.

Ad quartam & quintam, It was alledged that this was a good Revocation in Equity, being deliberately done, and with good Advice, although it was not in Strictness of Law, all Circumstances being not pursued, and for that Powers of Revocation were favoured at Common Law, and the Judges had therefore gone very far in Construction in Favour of them. Vide 10 Co. Scrope's Case.

But to that it was answered by the Judges, that the Common Law having gone very far in Favour of them, was no Argument that a Court of Equity ought to go farther, but rather the contrary.

And it was said, that in all Cases of Settlements and Revocations merely voluntary, all Circumstances ought to be pursued, unless in two Cases.

1. The one whereof is where the Party is prevailed upon by some Fraud or Practice, as in Case the Deed which contains the Power is concealed from him, so as he cannot see the Circumstances he is to observe; and here it was said by Treby, That in Case it had appeared by Proof, that the Duke had desired to see this Settlement, and the Earl of Bath had detained it from him, it might have altered the Case.

The other Case is where there is a Disability, so that it is not in the Party's Power to do it; as where a Man is to purchase and settle, Lands in Dale of equal Value, and no Lands being to be had there, he purchases in Sale, this is good in Equity; or where a Man is to do an act at a remote Place, and falls Sick or is disabled that he cannot get thither, there the Court of Equity may interpose, but in that Case the Party ought to do all he can.

And there is no Precedent of any Case in Equity comes up to this, that the Court of Equity hath given any Aid where both Parties were Volunteers. But all the Precedents that have been of that Nature, have been either in Case of Purchasers, or else where the latter Settlement is made upon some Moral Consideration, as the Payment of Debts, or Raising of Portions for Children, which are looked upon to be in the Nature of Debts, every Man being by the Law of Nature bound to pro-

vide

vide for his Children; and these are Considerations which the Law hath always had a Regard to; and in the Statute of 32 H. 8. concerning Devises of Lands, these are mentioned to be the Considerations of making that Statute.

And per Baron Powell, In case of Purchases the Law is clear, that a Deed with a Power of Revocation is Fraudulent; and for the Cases which have been produced, all differ from this Case.

As for the Case of Smith versus Aston, ——————

As for the Case of Thorn versus Newman,

There was a Covenant to stand seised to Uses, upon a Power of Revocation, upon the Tender of 12 d. in the Middle Temple-Hall, and there the 12 d. was tendered to the Party at another Place, and held good. But that is no more than it would have been at Law, Tender or Payment being made to the Party himself, though at another Time and Place. 1 Inst. 212. Moor 267. 3 Cro. 1 Anderson.

The Case of Dye and Twhaite. Conveyance to such Uses as he should limit by any Writing under his Hand and Seal, and limits a Rent issuing out of the Land by a Will sealed in the Presence of two Witnesses, and held good.

1. Where a Man hath Power to limit the Use of Land, he hath Power to limit a Rent out of it.

2. Though this were a void Will by the late Statute, having but two Witnesses, yet it was held good for this purpose to execute a Power.

As for the Case of Ward versus Poole,

As for the Case of Arundel versus Philpot, vide ante Case 113.

There it was held that the Guinea being tendered, was no Revocation, the Deed not being executed, and that makes for the Earl of Bath.

DE

Term. Paſchæ

1694.

In Curia Cancellariæ.

(272.) A Mortgage was made for Security of Money with Intereſt at 5 per Cent. with a Covenant that in caſe the Money were not paid within one Month after it became payable, that then 6 per Cent. ſhould be paid for Intereſt; and upon a Bill to redeem, the Queſtion was only concerning Intereſt, whether 5 or 6 ſhould be paid? And decreed that in this Caſe 5 per Cent. only ſhould be paid, becauſe the original Agreement was for 5, and the Covenant to pay 6 but a Nomine pœne. But where the original Agreement is to pay 6 per Cent. with a Proviſo that if the Money be paid within one or two Months, &c. after it becomes payable, that then the Mortgagee will accept 5, there, unleſs the Money be paid within the Time agreed, the Court will allow 6 per Cent. and this was ſaid to be the Lord Hallifax's Caſe, ſo the Difference is concerning the original Agreement only.

Lord Keeper. Intereſt.

(272. b.) A Copyhold was deviſed to Truſtees for 21 Years, to raiſe Legacies for Grandchildren, and no Surrender made to the Uſe of the Will; and the Queſtion was, Whether this Court ſhould help in this Caſe, as it will do in Caſe of a Purchaſer or Proviſion for a Child? But here it was objected this was no Proviſion but a Bounty in the Grandfather. But per Curiam, This Court will compel the Heir to make it good, as well as in the Caſe of Children.

Copyhold deviſed. No Surrender, Ante Caſe 75. Poſt Caſe 305.

DE
Term. S. Trin.
1694.
In Curia Cancellariæ.

(273.) **Clarke *verſus* Turner.**

Truſt to diſpoſe as the Truſtee ſhould think fit.

A. Deviſes to Turner and his Heirs, upon Truſt that he ſhould convey it to ſuch of the Relations of the Teſtator as he ſhould think beſt, and moſt reputable for his Family. A. dies without Iſſue, and the Heir at Law, who was the Teſtator's Brother, prefers a Bill againſt the Defendant to have him convey the Eſtate to him.

It was in Proof on the Defendant's Part, that the Teſtator, before the making of his Will, did ſeveral Times declare that the Plaintiff was an ill Husband, and would ſpend his Eſtate if he ſhould leave it to him, and ſeveral other Expreſſions ſhewing the Diſlike of the Teſtator to the Plaintiff.

But per Curiam, There being nothing in Proof againſt the Plaintiff, of any Misbehaviour ſince the Deceaſe of the Teſtator, this Court will judge it moſt reputable for the Family, that the Heir at Law ſhould have it, and for the Diſcourſes which were before the making of the Will, thoſe were all at an End by making the Will; and notwithſtanding all thoſe Diſcourſes, it cannot be denied but if the Truſtee would give it him, he was not diſabled to take it.

And in this Case the Case of Mosely and Mosely was cited, where an Estate was devised to be disposed by two Trustees, to such of his Relations as they should think fit, and they disagreed, and thereupon this Court decreed it to be conveyed to the Heir at Law.

And a Case of Baker and Barrett was cited, where a Man gave a Personal Estate to his Wife, upon Trust that she should dispose it amongst her Children, in such Manner as she should think fit; and she would have made an unequal Distribution of it; and this Court ordered her to give it amongst them equally, there being no Proof of any Misbehaviour in any of them. And in this Cause it was decreed, that the Defendant should convey to the Plaintiff who was Heir at Law. 4 Rep. C. 228.

Gell *versus* Vermedun. (274)

Heir bound by Articles. *See ant. 30. 2. Dick. 664. & my opin. in a case 24 Dec. 1694.*

THE Defendant's Ancestor, to whom he is Heir, articled in his Life-time for the Sale of certain Lands, which by the Articles he covenanted to convey, but did not covenant for him and his Heirs; and the Question was, Whether the Heir should be bound to perform this Agreement? And held that he should, in as much as his Ancestor, after the Sealing of the said Articles, was in the Nature of a Trustee for the Plaintiff of those Lands, which Trust with the said Lands descended to the Heir; and decreed accordingly; and they cited Sir John Otway's Case, where when he was going to be married, his Wife's Uncle promised that he would settle his Freeholds and Copyhold upon his Wife and her Issue; and though this was by Parol only, yet this Court decreed an Execution of it, being in Consideration of Marriage.

And the Case of Stephens and Baily, where Tenant pur auter vie to him and his Heirs articled for a Sale, and died; although this is such an Estate, as is not Assets to the Heir, yet he was here decreed to execute this Agreement.

Harvey

Harvey *verſus* Chamberlaine.

(275.)

Lord Keeper. Portion.

THE Plaintiff married the Defendant's Siſter without the Conſent of her Father, and ſometime after the Marriage, the Plaintiff's Father and the Defendant's Father came to an Agreement, which was reduced into Articles, whereby the Defendant's Father agreed to pay 1000 l. to be put into the Hands of Truſtees, to be laid out in the Purchaſe of Lands, to be ſettled to the Uſe of the Plaintiff for Life, and then to his Wife, with Remainder to the Iſſue of their Bodies; before this Agreement was executed the Plaintiff's Wife died without Iſſue; and the Plaintiff preferred his Bill for the Portion; and the Queſtion was, Whether the Plaintiff having made no Settlement in the Life-time of his Wife, ſhould now come into Equity for this Portion, which by the Articles was to be laid out for the Benefit of the Husband and Wife and their Iſſue; and the Wife being Dead without Iſſue, there could be no ſpecifick Execution of the Agreement.

Ante Caſe 38, 64.

But the Court decreed the Payment of the 1000 l. it being the Wife's Portion, and it appearing that a Settlement was made upon the Plaintiff by his Father in Purſuance of the ſaid Articles.

And Sir Jonathan Atkyns's Caſe was cited, where the Husband's Friends and the Wife's did article to lay out 1500 l. apiece in Land, to be ſettled upon them and their Iſſue; and no Limitation over, as in this Caſe; and the Wife dying without Iſſue before the Money laid out, as in this Caſe, the Portion was decreed to the Husband by the Lord Jefferies.

DE
Term. S. Mich.

1694.

In Curia Cancellariæ.

Wanchford *versus* Fotherley. (276.)

THE Bill was for a Marriage Portion of 3000 l. upon the Marriage of the Plaintiff with the Defendant's Daughter, there being no Note or Agreement in Writing signed by the Defendant for the Payment of it; but it appearing that a Letter was Writ to the Plaintiff by a third Person, offering so much Portion, which Letter, it appeared, was writ by the Consent of the Defendant, and that afterwards he was acquainted with it, and agreed to it, and a Treaty was had for a Settlement suitable to it with Mr. Fotherley; but the Treaty depending long, the young Couple married. And although it appeared that Mr. Fotherley, before they went to Church, did declare he would give them nothing, and the Statute of Frauds and Perjuries was insisted upon, yet decreed for the Plaintiff, although his Wife is since Dead, and he married to another. And the Lord Keeper said, for his Countermand when they were ready to go to Church, he looked upon it as nothing, after the young Peoples Affections were engaged.

Lord Keeper. Statute of Frauds and Perjuries.

And for the Statute of Frauds and Perjuries, he cited two Cases.

One of Hart and More, where a Portion was decreed upon a Letter writ; and another Caſe of Maſquill, &c. where Writings were prepared and agreed, but being blotted, were ordered to be writ fair, and were ſo; but before they were ſealed the Party died; and this Court charged the Executor with the Portion agreed to be paid.

DE
Term. Paſch.
1695.
In Curia Cancellariæ.

(277.) **Earl of Lincoln's Caſe.**

L. L. Show. Parl. Cas. 154. Eq. Cas. Abr. 411.

Will revoked.

THE late Earl deviſed his Eſtate in Fee, and afterwards being in Treaty of Marriage, he by Leaſe and Releaſe conveyed his Eſtate to Truſtees, to the Uſe of him and his Heirs until the Marriage took Effect, and after the Marriage, to the Uſe of himſelf for Life, Remainder to his intended Wife for Life, with Remainder to Iſſue, &c. The Earl afterwards dying before the Marriage, the Queſtion was, Whether this Conveyance ſhould amount to a Revocation?

It was argued, That it was not a Revocation, becauſe when the Marriage took no Effect, the Conveyance took none neither.

And it was said that a Feoffment in Fee to the Use of the Devisor and his Heirs, would be no Revocation, because it is in the Nature of the old Use.

That, which is a Revocation at Law, is sometimes none in Equity; as a Fine levied to corroborate the Will is a Revocation at Law in Strictness; but being levied for that Purpose, it was said per Finch, that it would amount also to a Republication in Equity; and the same it is of a Feoffment for that Purpose, and so it was said it had been held in this Court; and two Cases were cited, of Thorne and Thorne, and of Hall and Dunch, in 1689, where the Court of Equity had ruled that to be no Revocation in Equity, which would have been so at Law; and a Case was cited of Mountague and Jefferies, Moor Rep. 429. Roll. 1614.

Agreed a Lease for Years is a Revocation only pro tanto, unless made to the Devisee, and then per totum, according to the Case 1 Cro.

Agreed a Mortgage in Fee is no absolute Revocation, but the Equity of Redemption will go to the Devisee.

Resolved afterwards, that it was a Revocation, and upon an Appeal so held in the House of Lords, carried only by two Lords.

This determination greatly disapproved of by Lord Mansfield. See 2 Bos. on Demise of Gibbons v. Pott & 2 Term Rep. 684. Yet L. M. says y. case here is now Law.

DE

DE
Term. S. Trin.
1695.
In Curia Cancellariæ.

(278.) **Lord Mohun's Caſe.**

Incumbrances in Proportion.

UPON the Marriage of the Father and Mother of the Defendant, it was agreed that an Eſtate of the Yearly Value of ——— ſhould be ſettled upon the Lady for Life for her Jointure, with Remainder to the firſt and other Sons. The Father being Dead, and the Eſtate agreed to be ſettled being incumbered, the Queſtion was, Whether the Incumbrance ſhould lie upon the Mother and Son in Proportion, or whether the Jointreſs ſhould be diſincumber'd and the Whole lie upon the Son? And a Caſe of Carpenter and Bennett was cited, wherein it was ſaid, that being firſt heard before the Lord North, he exonerated the Jointure, and laid the Incumbrance upon the Son; but afterwards being reheard before Jefferies, he reverſed that Decree, and laid it in Proportion. The Lord Keeper took Time to conſider of it.

(278. b.) Perſonal Eſtate in Aid of the Real.

IT was ſaid by Finch, that an Heir at Law ſhall have the Perſonal Eſtate in Aid of the Real Eſtate, but a Remainder Man ſhall not, and alſo that it ſhall be had againſt a Reſiduary Legatee, but not againſt a particular Legatee. But hæres factus ſhall have Aid as well as hæres natus.

Ante Caſe 266.
Poſt Caſe 346.

IF an Executor hath Assets, he is bound to redeem Mortgages for the Benefit of the Heir. (278. c.) Hard. Rep. 512.

If an Heir be charged with a Debt where the Executor hath Assets, he may compel the Executor to pay it, altho' the Creditor hath his Remedy against either. Heir and Executor. 3 Rep. Can. 74.

DE
Term. S. Mich.
1695.
In Curia Cancellariæ.

Drake *versus* Storr. (279.)

UPON a Treaty of Marriage, the Man gave a Bond to the Woman, conditioned that if he did permit her to dispose of 100 l. then the Bond should be void; afterwards the Marriage took Effect, so that the Bond became void, yet this was held to be a good Agreement; and the Court decreed that the Husband should give Bond to Trustees, with the same Condition. Agreement good, though the Bond void. Ante Case 191, 192.

It was held that a Bill may be exhibited by her Prochein Amy; or if Trustees exhibit a Bill for, or on her Behalf, it is good either way. Feme Covert.

(280.) A Devise of Goods to A. for Life, with Remainder after the Decease of A. to B. it is now clearly settled, that it is a good Devise to B. and that B. may exhibit a Bill against A. to compel him to give Security that the Goods shall be forth-coming at his Decease; and is all one whether the Goods or the Use of the Goods be devised for Life.

Remainder of a Personal Thing.
Ante Case 44, 172.
Post Case 357. b.

(280. b.) SIR Thomas Man's Case was cited by the Master of the Rolls, That where a Devise of Lands was made to the eldest Daughter, paying 100 l. to the second Daughter, and 100 l. to the third Daughter, &c. and if the eldest Daughter did not pay the 100 l. to the second Daughter by such a Day, then he devised the Land to the second Daughter, she paying her Sisters Portions by a certain Day; and if she did not pay, then he devised the Land to the third Daughter, &c. It was resolved this was not in the Nature of a Mortgage, to be redeemable after the Time of Payment was over; but that, the eldest Daughter not paying at the Time appointed, the second Daughter should have the Land, and the Eldest had no Relief.

Mortgage what, or Devise conditional.
Post Case 325.

DE
Term. S. Hill.
1696.
In Curia Cancellariæ.

AGREED, That where a Legacy is given to be paid at Marriage, or 21 Years, or any other particular Time, that it will carry Interest from that Time, though a Bill for it be not preferred till afterwards; but where a Legacy is given generally and no Time mentioned for the Payment of it, there it will carry Interest only from the Time of the Bill exhibited, or a Demand made. (281.) Legacy. Interest.

Lady Thomas *versus* Sir Charles Kemish & ux'. (282.)

Portion.

UPON the Marriage of Mr. William Thomas, several Manors, Lands and Tenements, were settled to the Use of Mr. Thomas for Life, with Remainders to the first and other Sons in Tail Male, and for Default of such Issue, to the Lord Wharton, and other Trustees for 500 Years, upon Trust to raise 5000l. for Daughters, payable at 18 Years or Marriage, Remainder in Fee to the right Heirs of Mr. William Thomas.

Mrs. Thomas had Issue of that Marriage one Son, viz. Sir Edmund Thomas, and one Daughter; Sir Edmund died an Infant, so that the Inheritance in Fee descended to the Daughter, who lived to her Age of 18 Years and two Months, and then died; a Day or two before she died she made a Nuncupative Will, and gave all which she had Power to dispose to her Mother (the Lady Kemish) and her Children by Sir Charles Kemish her second Husband, who married her after the Death of Mr. Thomas her former Husband.

The

The Lady Thomas, the Plaintiff, was great Aunt to Mrs. Thomas and Heir at Law, and the sole Question was, Whether Mrs. Thomas had any Power to give away this Portion of 5000 l. and whether it passed by the said Will to the Lady Kemish, or whether it was not extinguished in the Inheritance, by Reason that at the Time she became intitled to the Portion, the Freehold and Inheritance descended to her. The Trustees by Ejectment had recovered the Term at Law, and the Bill was to be relieved against that Term.

Term to subsist for Payment of Debts.

It was agreed that in Case of Creditors for Payment of Debts, or for a Provision for Children, this Term should have subsisted so as to have raised the 5000 l. as if Mrs. Thomas had been indebted at the Time of her Decease, the Creditors might have come for Satisfaction out of it; and so it was held in my Lord Pembroke's Case, where the Creditors laid hold of a Term to attend the Inheritance.

And it was agreed in the Lord Pawlet's Case, that if the Daughter had married, although she had died before the Portion became payable, yet the Husband should have had it.

Heir and Executor. Ante Case 266, 278. c. Post Case 346.

Obj. It was objected for the Plaintiff, that this Court hath always a great Regard for the Heir at Law, as if a Creditor upon Bond recovers against the Heir, he may come into this Court to be reimbursed out of the Personal Estate, because that is first to be applied for Payment of Debts, although the Creditor hath his Election to sue which he pleaseth; which was agreed; and it is also so in Case of a hæres factus by Will or otherwise.

Ans. But it was said that this Court had also a Regard to an Executor or Administrator; as in Case of a Mortgage in Fee forfeited, the Executors or Administrators shall have the Money, tho' the Estate in Law is vested in the Heir.

Legacy.

A Legacy given to be paid at 21, and the Party dies before that Age; there have been different Opinions in this Court about the Time of Payment of it; sometimes it hath been held that the Executor or Administrator should have it presently after the Death of the Legatee; and sometimes that it shall not be paid till the Legatee would have arrived to that Age in Case he had lived; but agreed by all, that the Executor or Administrator of the Legatee should have it; and so it was in Case of a Portion till the Lord Pawlett's Case; and then it was held

Ante Case 26, 74.

held that in Case of a Portion it should sink for the Benefit of the Heir.

Obj. Here is no express Disposition, but she gives all that she can give by Law, and there is a great Personal Estate besides to answer the Words of the Will.

Ans. This was an Interest vested in her by Reason of her living to above the Age of 18, and therefore this will pass as well as the Rest.

In a Case of Audley versus Audley, it was held that where the Guardian of a Lunatick, or the Trustee or Guardian of an Infant, having a Personal Estate in their Hands, purchase an Estate of Inheritance for the Infant, and the Infant or Lunatick die, the Executor or Administrator shall have the Benefit of this Purchase, and not the Heir, because it shall not be in the Power of a Guardian or Trustee to change the Nature of the Estate from a Personal Estate into a Real Estate of Inheritance. Ante Case 126.

In a Case of Holt and Holt, a Purchaser of an Estate takes the Conveyance of the Freehold to himself and his Heirs, and takes an Assignment of a Term in Trust for himself, his Executors and Administrators, and yet decreed a Term to attend the Inheritance. Post Case 358. Term to attend the Inheritance.

In a Case of Powel and Mayo, a Term to attend the Inheritance may by express Words be devised and separated from the Freehold.

A Case of Norborne and Norborne was cited, where a Bill was preferred in the Life-time of the Daughter, to have made such a Portion as this is a Personal Estate, where the Inheritance was descended upon the Daughter as Heir at Law, and the Bill was dismissed.

If a Legacy be given to A. payable at her Age of 21 or Marriage, and if she dies before the Age of 21 or Marriage, then to go to B. there or is generally taken for and, for if she marries, though she after dieth before 21, her Husband shall have the Legacy. Or, for and.

The Lord Keeper desired to see the Precedents cited, and took Time to give his Opinion.

Afterwards he gave his Opinion that the Portion was not extinguished, but passed by the Will, and afterwards, upon an Appeal, his Decree was affirmed in the House of Lords, and my Lady Kemish had the 5000l. Post Case 358.

Burford *verſus* Lee.

(283.)

Term deviſed.
Ante Caſe 127.
Poſt Caſe 299, 303.

A Termor of 1000 Yeats without Impeachment of Waſte, deviſed the ſame to the Defendant Lee, and if he died without Iſſue, then to the Plaintiff.

The Plaintiff had got an Injunction to ſtop Waſte, unleſs Cauſe this Day; and it was alledged for Cauſe, that the Plaintiff upon his own ſhewing had no Title, becauſe the Deviſe to him after the Death of the Defendant without Iſſue, was void. It was objected that the Deviſe was not to the Defendant and the Heirs of his Body, as it was in the Duke of Norfolk's Caſe; and that the Words, if he died without Iſſue, ſhould be conſtrued, without Iſſue living at the Time of his Deceaſe, which was agreed to be good, in Caſe it had been ſo expreſſed.

But here it was held per Lord Keeper, that this being a Deviſe after dying without Iſſue generally, is void, and thereupon the Cauſe was allowed, for that it appeared the Plaintiff could have no Title, but that it went to the Defendant, his Executors and Adminiſtrators.

Flud *verſus* Flud.

(284.)

Mortgage redeemed in Proportion.
Poſt Caſe 301.

AN Eſtate in Jointure was ſubject to a Mortgage. Reſolved that the Jointreſs and the Reverſioner muſt redeem in Proportion, viz. the Jointreſs one third Part, and the Reverſioner two Thirds, and that hath been the Proportion uſual in this Court, to charge the Eſtate for Life with a Third; but it ſeems hard, becauſe now an Eſtate for Life is worth nine or ten Years Purchaſe, whereas formerly it was worth but ſeven.

And ſo it is if an Eſtate ſubject to a Mortgage, is deviſed to A. for Life, Remainder to B. in Fee, there they may redeem in Proportion, viz. A. one Third, and B. two Thirds.

(284. b.)

Hops to the Executor.

IN this Caſe it was held that Hops which grew out of old Roots, the Perſon dying in July, viz. after Manurance, ſhould go to the Executor, and not to the Heir, 1 Cro. 515 ſo held, and no Reſolution ſince to the contrary, but otherwiſe it is of Apples and Nutts.

THIS Difference was held, that if a Woman before Marriage be intitled to Bonds or Things in Action, and the Husband die Intestate, there Choses in Action shall belong to the Wife; but if there were any Agreement made upon the Marriage, or any Settlement made in Consideration of the Portion, there the Executor or Administrator of the Husband shall have it. (284. c.)

Baron and Feme. Post Case 310, 331.

Lady Radnor *versus* Rotheram. (285.)

THE Lord Radnor in his Settlement limited a Term to Trustees for 99 Years, for such Uses and Purposes as he should appoint, and for Default of Appointment, to attend the Remainders, which were to the Use of him and the Heirs of his Body, Remainder to his own right Heirs; afterwards he makes several Appointments in Pursuance of the Trust, and dies. The Appointments are all satisfied.

Dower. Sho. Rep. 69. S. C. 1. Vern. 179. 356. 2. Cha. Cas. 172. 1. Eq. Cas. Abr. 219. Rec. in Cha. 65. Show. Parl. Cas. 69.

The Plaintiff brought a Writ of Dower and recovered at Law, but could have no Fruit of it, by Reason of this Term, which was taken in by the Defendant, who purchased Part of the Estate, and was kept on Foot to protect his Purchase. Whereupon she preferred her Bill to be let into the Estate, notwithstanding the Term, the Appointments being all satisfied.

It was insisted for her, that the Trusts being satisfied, and the Term being to attend the Remainder, ought likewise to attend her Dower which was reserved out of the Remainder.

It was agreed in this Case,

1. That a Jointress should have had this Term to have attended her Estate, and should not have stood in her Way.

2. In case there had been any Agreement that she should have had her Dower, that then this Term should not have stood in her Way.

3. In Case there had been a Mortgage upon the Estate, she should have been let into a Redemption, for that when the Mortgage is satisfied the Mortgagee hath no more to do with the Estate. Beverley and Hayes.

4. In case of an Extent of a satisfied Statute, a Dowager hath been relieved against it, because it ought to be vacated.

But

Ante Case 77, 83. Post Case 304.

But the Lord Keeper was of Opinion that the Plaintiff could have no Relief in this Case; he said there was no Precedent where the Dowager was ever yet relieved against an Heir at Law, where there was a Term to attend the Inheritance, and much less in this Case where the Defendant is a Purchaser.

And for that which was alledged, that the Defendant at the Time of the Purchase had Notice of the Plaintiff's Right of Dower, so he had also Notice of the Lease which was to protect it, and so that was nothing.

For the Case of Fesont and Fesont, where the Dowager brought a Bill to be relieved against a Term to attend the Inheritance, it was not resolved, but the Case was agreed.

The Case of Fletcher and Robinson, where Colonel Robinson being in Danger of a Forfeiture made a Lease to his younger Son, and after the elder Son marrying and dying, his Widow brought a Writ of Dower, and this Lease being insisted upon, it was decreed that it should not be given in Evidence; but there the Reason was, because it was perfectly a fraudulent Lease.

Fol. C. 2. Rep. 324. And for the Case of Clay and Sell, where it was held that Tenant by the Curtesy should have the Benefit of a Term attending the Inheritance, which Decree was made at the Rolls and affirmed before him; he said he had looked upon his Notes, and never found that that Point was stirred in the Case.

And though in this Case, here is great Reason to assist the Plaintiff, she having brought a great Fortune into the Family, he said that could make no Alteration; for it might be said to be reasonable that there should be Dower of the Trust of an Inheritance, or of a long Term for 1000 Years, and yet it was never done; and he said if the Defendant here had been only Heir at Law, he could have given no Relief, there having been no Precedents, especially in a Case which must needs happen often.

* But see contra 2. P. Wms. 707. Jap.

(285. b.) Distribution.

IT is held that where a Man makes a Will and an Executor, and the Executor dies, an Administrator de bonis non shall not make Distribution, because the Party did not die Intestate, and so not within the Statute.

Where a Man dies, having made his Will and an Executor, and gives him any particular Sum, as 5 or 10l. and makes no Disposition of the Rest and Residue, there the Residuum shall be distributed to the next of Kin, be-

because although he makes a Will, yet he is held to die Intestate as to the Residuum. Post Case 293.

Penhey *versus* Hurrell. (286.)

A Settlement was made by Jo. Hurrell to the Use of Samuel his eldest Son for Life, Remainder to the first and other Sons of Samuel in Tail Male successively, Remainder to Trustees and their Heirs, upon certain Trusts to raise Money, and after those Trusts satisfied, to the Use of George the second Son of Jo. Hurrell for his Life, with Remainder to his first and other Sons in Tail Male successively, and for Default of such Issue, to a third Son of Jo. Hurrell in like Manner. All the three Sons join in Bargain and Sale to make a Tenant to a Pracipe, in order to suffer a Recovery, which Bargain and Sale was acknowledged by one of them only, and inrolled; and thereupon a Recovery was suffered, and the three Sons were all jointly vouched before either of the three Sons had any Issue; and afterwards Issue was born to George; and the main Question was, Whether the Issue was bound by this Recovery? Whereupon these Points were resolved: Post Case 302, 307, 326. 370.

1. Though the Deed of Bargain and Sale was acknowledged only by one of the Parties, yet the Inrolment was good enough; and so it would have been if it had been acknowledged by neither of them, in case it had been inrolled. Godb. Rep. Winchcombe versus Dunch. Inrolment.

2. Though the three Sons were all jointly vouched, and one of them only had any legal Estate, that it was well enough, because the Recompence in the Value will enure only to him who had the Estate in Law. Plo. C. Eyre versus Sare. Joint Voucher in a Recovery.

3. Where Tenant for Life, Remainder to his first Son, &c. makes a Conveyance of his Estate by Feoffment, Recovery, &c. before the Birth of Issue, this destroys the contingent Remainder; and where it hath been once destroyed at Law it hath never yet been set up again in a Court of Equity.

4. Where the Trust of an Estate is limited to a Man and the Heirs of his Body, with Remainders over, if this Tenant in Tail of a Trust suffers a Recovery, the Remainder is destroyed. But where Tenant for Life of a Trust makes a Feoffment or any other Conveyance, this is Trust barred by a Recovery. 3 Rep. C. 49. 213. Vent. 359.

is no Forfeiture of his Eſtate; neither will it deſtroy the contingent Remainder, becauſe whatever Conveyance he makes, he having no legal Eſtate in him, it paſſes only what he can legally grant; but the Reaſon why a Recovery ſuffered by Tenant in Tail of a Truſt will bar the Remainders, is, becauſe he is Maſter of the Eſtate, and may call in the legal Eſtate when he pleaſeth, and have it executed to the Truſt; but this Court will never execute the Eſtate in Law to Tenant for Life, to enable him to deſtroy the contingent Remainders.

The Limitation to George and his Iſſue being after a Fee limited to the Truſtees and their Heirs, a Queſtion was made, Whether thoſe Remainders after a Fee were good? And held that they were, becauſe it limited only the Truſt of the Eſtate after the Money raiſed and the other Truſt ſatisfied.

De Term. Paſch. 1697.

In Curia Cancellariæ.

(287.) Will. Penn *verſus* Browne & al'.

Maſter of the Rolls. Truſtee aſſigns without Notice. *See 1. Cha. Cas. 90.*

A Bond was taken for 1400l. in the Name of one Leman a Scrivener, in Truſt for the Plaintiff; Leman having Occaſion for Money, without the Privity of Penn, borrows it of Browne, and aſſigns this Bond to Browne for Security; Browne having no

no Notice of the Truſt, and there being nothing of the Truſt appearing by the Bond; and the Queſtion was, Which of them ſhould have the Benefit of the Bond?

It was agreed, that if it had been a Mortgage, and it had been aſſigned to Browne without Notice of the Truſt, that Browne ſhould have had it, becauſe there a legal Eſtate had been veſted in him without Notice; but this Caſe, as was inſiſted, differed from that, becauſe by the Aſſignment of a Bond nothing paſſes at Law but an equitable Right, which is rebutted by the prior Equity in the Plaintiff; and ſo it was ſaid it was held in the Caſe of Sir Edward Abney, by the Lord Chancellor. *ſee 1. Bro. Cha. Cas. 434.*

But the Maſter of the Rolls was of Opinion in this Caſe, that Browne ſhould have it; but Sir Edward Abney's Caſe being cited to be in the very Point, he deſired to ſee that Caſe before he would give any Opinion. *[illegible]*

He ſaid it is a ſtanding Rule here, that if I truſt a Scrivener with my Bond, and the Obligor pay him the Money and take up the Bond, that I ſhall have no Remedy againſt the Obligor; but if the Obligor compound with the Scrivener for leſs than is due, it is an Evidence of Fraud, and then it may be the Obligor may pay the Money again. Scrivener: Poſt Caſe 317. *ſee Acc. in Cha. 209.*

Bowyer *verſus* Peake. (288.)

A Feme Covert trades by the Conſent of her Huſband, buys and ſells Goods, and gives Bills for Money, and her Huſband permits her ſo to do, and receives the Profit of her Trade; if ſhe dies and leaves a Stock to her Huſband, he ſhall be anſwerable for Debts contracted in the Trade; and it was ſaid by the Maſter of the Rolls, that a Feme Covert is not under a total Diſability to contract, but if the Huſband be aſſenting, it is obligatory; and he cited the Caſe in H. 8. that if a Woman ſeals a Bond in the Preſence of the Huſband, and he ſtands by, and doth not gainſay, it ſhall bind, which he believed may be taken out of the Book of Numbers, where it is ſaid, If the Huſband be preſent, and doth not Gainſay, it ſhall bind. Maſter of the Rolls. Feme Covert Trader.

And in this Caſe the Suit being againſt the Huſband, after the Death of the Wife, for a Bill of One hundred

ded Pounds which she had borrowed of the Plaintiff for carrying on the Trade; an Issue was directed to try whether the Money was borrowed for that Purpose; for if it were, the Husband should be decreed to pay it.

DE

Term. S. Mich.

1697.

In Curia Cancellariæ.

Marquis of Normanby *versus* Duke of Devonshire.

(289.)

Execution of an Agreement in Specie.

THE Bill being to have the specifick Execution of an Agreement, made with my Lord Berkeley concerning Berkeley House;

It was said that before the Statute of Frauds and Perjuries, this Court would not execute a Parol Agreement, unless it had been executed in Part of one Side or the other; and then it would, because it was but Reason, when one Party had performed of his Part, that the other Party should be compelled to perform of his Part.

But if an Agreement be under Hand and Seal, that is supposed to be made and transacted with greater Caution

and Solemnity, and though there had been no Execution of either Side, yet this Court will compel the Execution of it.

It was said by the Attorney General, that since the Statute of Frauds, &c. if an Agreement be made and reduced into Writing, and signed but not sealed, that this is still but a Parol Agreement, and the Writing is only an Evidence of it.

It was said also, that where this Court executes an Agreement in Specie, it must be such an Agreement as is fairly made, without any Fraud or Circumvention.

Where no Action at Law will lie to recover Damages, there this Court will not execute the Agreement in Specie, for Equity will never make that a good Agreement which is not good by Law.

Car *versus* Boulter, Executor of Sir John Cutler. (290.)

Master of the Rolls.

Assignee of a Mortgage, what to be allowed.

Ante Case 146.

BRowne the Mortgagee of Car for a small Consideration assigns his Mortgage to Sir Jo. Cutler; and the Bill was to redeem the Mortgage; and the Question was, Whether this Executor of the Assignee of the Mortgage should insist upon the whole Mortgage-Money, or upon so much only as he paid the Mortgagee? And it was said per Cur', That it is the constant Rule of this Court, that if the Mortgagee assigns without the Mortgagor's being Party, the Assignee shall stand in the Place of the Mortgagee, and have the Benefit of all the Mortgage Money, whatever he gave for it; but if such Assignment be made, and the Mortgagor a Party, there what the Assignee pays he shall be allowed, and no more, because the Mortgagor being made Party, the Sum paid by the Assignee is as it were an Account stated to that Sum.

Offer refused.

It was in Proof that Boulter had offered to take a less Sum; but to that it was answered per Cur', That wherever a Person offers to take less than is due to him, there if it be paid him, he shall never recover more in Equity; and on the other Side, if the Debtor doth not accept the Offer, this Court will never hold the Party to it afterwards.

(291.) Floyd *versus* Cary.

Lord Chancellor. Ch. J. Treby, J. Rookeby.

Contingent Fee upon a Fee.

A Settlement was made to the Use of T. Cary for Life, Remainder to Penelope his Wife, for Life, Remainder to Trustees to preserve contingent Remainders, Remainder to the first and other Sons in Tail, Remainder to Issue Female, Remainder to the right Heirs of J. Cary; Provided nevertheless, that if the said T. Cary and Penelope his Wife should die without Issue living at the Time of the Decease of the Survivor of them, then in Case the Heir of Penelope should pay the Sum of 4000 l. to the right Heirs of the said J. Cary, within one Year after the Decease of the Survivor of them the said T. Cary and Penelope his Wife, that then the said Settlement should enure to the Use of the right Heirs of the said Penelope. T. Cary and Penelope his Wife, (and the said Trustees) levied a Fine sur Conuzance, &c. and being both Dead without Issue, the Heir of Penelope tendered the 4000 l. which being refused, he brought his Bill to have the 4000 l. accepted, and to have the said Estate.

Two Questions were made,

1. Whether this Limitation to the Heirs of Penelope upon this Contingent was good in its Creation? And it was held by all of them that it was void in its Creation; for although as in the Case of Pell and Browne it is adjudged, and so held since that Time, that a Fee may be limited to arise upon a Fee upon a Contingency, yet that Contingency ought to be such as should happen either in the Life of one or more Men in Being; and my Lord Chancellor said he never yet knew that it had been held good for more than one Life; but since it had been held in the Case of a Trust of a Term for Years, that it should be good after several Lives, so that they were all in Being, he thought it might be so in Case of a contingent Fee; but here was the Space of one Year after the two Lives, and if it might be good for one Year after a Life, it might be so for two Years, and so for Twenty, and no Bounds to be set; which would be of ill Consequence that Mens Inheritance should have such Contingencies hovering over them, which could not be barred by any Fine or Recovery or other Conveyance.

5 And

And it was said that the Judges had always been very tender upon this Point, as oft as it hath come in Question since Mar. Manning's Case in the 8 Co. and some of them have said, if that Case were to be now judged, it would not be so determined.

The Mischief of a contingent Fee is, that it cannot be barred by Fine or Recovery, whereas a Possibility expectant upon an Estate Tail, is barred by Recovery. Moor 73.

The Authorities cited were, 1 Roll. Rep. 253. Simson's Case. Hutton 60. Jones 16. Child and Baylie's Case, 1 Roll. 1 Cro. 358, 575. 3 Keb. 122, 176. Style 174, Jay versus Jay.

2. Admitting this was a good contingent Fee in its Creation, whether it was barred by the Fine? And that rested upon this Point, whether the Heir of Penelope in this Case should take by Descent or by Purchase, i. e. Whether the Word Heir be a Word of Limitation or Purchase.

Rookesby: If he take at all, it must be as a Purchaser, and then the Fine will not bar him, which confirmed him in his Opinion, that the Limitation was void in its Creation, because it is such a one as cannot in any way be barred, and so would be as it were a Perpetuity, which seems to oppose the Divine Providence, whereby all Things are subject to Changes and Vicissitudes in this World, and thereby Traffick and Commerce are promoted.

Treby said, This was a Point so difficult to him, that the more he thought of it, the more he was puzzeled in his Thoughts about it, and so would deliver no Opinion in it, because the first Point determined the whole Cause.

Lord Chancellor seemed to be of Opinion, That the Heir of Penelope, in Case he had taken any Thing, took it by Descent; but Chief Justice Treby having declined to discourse of that Point, he waived it too.

Note, It was touched by Treby what Term of Years might be a reasonable Term for the Performance of such a Contingency; he agreed that a Fee might be limited upon a Fee to arise upon a Contingency to be determined in some reasonable Term of Years; but it was never yet determined what should be such a reasonable Term; if it were within the Space of 21 Years, he thought it might

2 And. 57. 2 Cro. 683. Pop. 60.

might be good, because that is but an Equiva lent to Lives; and if any Measure might be taken from Acts of Parliament, 21 Years was thought a reasonable Term for Ecclesiastical Persons to demise, and for Leases in Corporations 40 Years; and at Common Law a Lease was not good for more then 40 Years; and he said it had been held in another Court that 30 or 40 Years might be a reasonable Time for the Determination of such a Contingency, but it was never yet settled.

It was said by my Lord Chancellor, that in this Case of Contingency, Equity should follow the Law, and carry it no farther than it would be good at Law, because there ought not to be different Rules of Property in Law and in Equity. Note; This Decree was afterwards reversed in the House of Lords.

Mr. Bartie & ux' *versus* Lord Falkland.

S. C. 2. Vern. 293. 3. Cha. Can. 129.

(292.)

Lord Chancellor, Ch. J. Holt, Ch. J. Treby.

Breach of a Condition to be relieved.

MR. Carew being seised of an Estate of near 2000 l. per Ann. deviseth his Estate to Trustees, upon Trust that in Case Mrs. Willoughby (Daughter to the Lord Willoughby, and his near Relation and Heir at Law) should marry the Lord Guildford within three Years after his Decease, that she should have the Profits of his Estate for her Life, and after her Decease, deviseth the same to her Issue by my Lord Guildford, and for Default of such Issue, to the Lord Falkland and the Heirs of his Body, with Remainder to one Mr. Carew; and if she did not so marry, then he devised to the Lord Falkland immediately.

The Lord Guildford and Mrs. Willoughby were both Infants under the Age of 16. There was a Treaty between the Trustees of Mrs. Willoughby and the Trustees of my Lord Guildford, for a Marriage, but it broke off, because they could not agree upon Terms, and she married the Plaintiff, who is one of the Sons of the Lord Abington; and my Lord Guildford is also married; and now the Plaintiffs brought their Bill to be relieved against the Breach of this Condition, and to have the Trustees convey; and the sole Question was, Whether Equity could relieve against the Breach of this Condition?

It was insisted for the Plaintiffs, that the Plaintiff was an Infant, not fourteen at the Time this Condition should have been performed, and that she was not so much

in the Fault as her Truſtees that it was not perfoꝛmed, who bꝛoke off the Treaty upon Terms; and howeveꝛ this being not a Deviſe of the Eſtate, but of the Truſt of an Eſtate, that Equity might carry it farther than in Caſe of a legal Eſtate, a Truſt being a Creation of this Court, and the Party here was Heir at Law, who is always favoured.

But by the Opinion of the Chancelloꝛ and two Chief Juſtices, Equity could not relieve againſt the Bꝛeach of this Condition.

1. Foꝛ that this was a Condition pꝛecedent, and that the Plaintiff had no Intereſt until the Condition perfoꝛmed; and Holt ſaid he thought that there could be no Relief in Equity againſt a Condition pꝛecedent; but in many Caſes there might be againſt a Condition ſubſequent, which being to deveſt an Eſtate, is not favoured in Law; but to that the Chancelloꝛ ſaid, poſſibly a Caſe might have happened where a Perſon might be relieved againſt a Condition pꝛecedent; as if it had appeared that the Loꝛd F. who is in Remainder, had by any Fraud oꝛ Artifice obſtructed the Marriage, there Equity would have relieved, becauſe he ſhould have had no Benefit of ſuch a Contrivance.

As foꝛ the Objection of Infancy, they all held that could make nothing; foꝛ where a Condition is annexed to the Eſtate of an Infant, it is to be perfoꝛmed at the Peril of the Infant; and that is no moꝛe than was in the Caſe of Fry and Porter, which was ſaid to be a harder Caſe than this; foꝛ there was Infancy, and the Infant had no Notice of the Foꝛfeiture by the Marriage without Conſent, and there the Truſtees did give a ſubſequent Aſſent; but all would not help. As foꝛ it's being in the Limitation of a Truſt, that would make no Difference; foꝛ as to the Limitation, that would be conſtrued in the ſame Manner as Limitations of Eſtates, foꝛ otherwiſe there would be different Meaſures of Inheritance, which ought not to be.

And as to Foꝛfeitures by Bꝛeaches of Conditions even ſubſequent, there was a Difference where an Equivalent could be made; as foꝛ Non-payment of Money and Conveying of Eſtates, &c. but this was a Caſe which could admit of no Equivalent, unleſs it ſhould be ſaid to be the ſame Thing to marry my Loꝛd Guildford and Mꝛ. Bertie; beſides it appeared here, that Part of the Conſideration of the Teſtatoꝛ's ſo ſettling his Eſtate did ariſe from my Loꝛd

Guildford, because it is a Provision for her Issue by him, which now is impossible; so that if the Court could decree for the Plaintiff, it would be difficult to know what Decree to make.

Holt said, That the Case of the Lord Bath and Mountague was stronger than this; for there the Duke of Albemarle imposed Terms of Revocation upon himself, to be done in the Presence of three Peers and three Commoners, and in Case of a voluntary Settlement it could not be dispensed with, and yet a Power of Revocation ought to be taken favourably, because the Relict of an antient Property.

It was agreed that all Letters and other Proofs, made or produced in this Case to prove Mr. Carew's Intention, were to be rejected, and then the Will was to stand or fall upon its own Construction. It was held also, that if the Condition had become impossible by the Act of God, which is help'd in Case of a subsequent Condition, that it would not have help'd in this Case, because the Estate was not to vest but upon the Performance of it.

Ante Case 266.
Post Case 313.

And as to the Objection, that the Plaintiff is Heir at Law, who is always favoured, that makes nothing, so as to make him take against the express Gift of the Ancestor, nor in other manner than the Ancestor gives it. So the Plaintiff's Bill was dismissed, and a Decree for my Lord Falkland, upon his Cross Bill.

DE
Term. S. Mich.
1698.
In Curia Cancellariæ.

Humfryes *versus* Rigby. (293.)

Gaming.

THE Bill was to be relieved against a Bond given for Money won at Play, viz. at All-fours. The Plaintiff was a Distiller of Strong-Waters, and the Defendant a Tapster at the Bowling-Green in Red-Lyon-Fields; and it appearing that the Defendant laid the Cards, and turned up the Knave of Clubs (which was Jack) several Times together, and being an unreasonable Sum for such Persons to venter at Play, the Plaintiff was relieved, and the Bonds ordered to be delivered up, although this Case was not within the Statute, the Bond being for less than 100l. yet this Court always relieved before the Statute, where any Fraud appeared.

Gibson *versus* Gibson. (294.)

At the Rolls.

Posthumous Child.

Ante Case 46.

A. Gives a Bond to pay 900l. to his Daughter in case he should have no Son living at the Time of his Decease, and he died, his Wife being great with a Son; and the Question was, Whether the Daughter should have this 900l. which if she had would have been more than his Son would have had?

Per

Per Cur': She shall not have it; for altho' there was no Son living at his Decease, so that it is not recoverable at Law, yet it cannot be presumed to be his Intention, that if a Son was born after his Decease the Daughter should run away with the Estate; and in this Case it appeared that the Mother was Quick at the Death of the Father, and by the Civil Law Posthumus pro nato habetur, and so decreed that the Plaintiff should be relieved against the Bond.

Post Case 313.

(295.)

Irod *versus* Hurst.

At the Rolls.

Will.

New Publication.

THE Defendant's Testator by his Will gave his four Daughters 600 l. apiece, and afterwards married his eldest Daughter to the Plaintiff, and gave her 700 l. Portion; after that he makes a Codicil and gives 100 l. apiece to his unmarried Daughters, and thereby ratifies and confirms his Will, and dies; and the Plaintiff preferred his Bill for the Legacy of 600 l. given to his Wife by the said Will; and the only Question was, Whether the Portion given by the Testator in his Life-Time, should be intended in Satisfaction of the Legacy? And held that it should; and agreed to be the constant Rule of this Court, that where a Legacy was given to a Child, who afterwards upon Marriage or otherwise had the like or a greater Sum, it should be intended in Satisfaction of the Legacy, unless the Testator should declare his Intent to be otherwise; and it was said the Words of Ratifying and Confirming do not alter the Case, though they amount to a new Publication, being only Words of Form, and declare nothing of the Testator's Intent in this Matter.

Intendment.

(296.)

Anonymus.

Master of the Rolls.

Power to make Leases.

GRandfather, Father and Son; the Grandfather being seised of an Estate, upon the Marriage of the Father settles it to the Father for Life, Remainder to the first and other Sons of the Father in Tail successively, &c. with Power to the Father to make Leases, not exceeding three Lives or 21 Years, which Power extended only to Leases in Possession. The Father after his Marriage having Issue several Sons, makes a Lease for three Lives to his younger Son, of an Estate which

was then in Lease, so that at Law this Lease being a Reversionary Lease was void; and the Question was, Whether it should be supported in Equity? And it was decreed that the younger Son should hold and enjoy during the Lease, it being a Provision for a Child; and he took these Differences upon Powers.

1st Difference, Between a Power created by Act of Parliament, which should always be taken strictly, and Equity will not help it; but if it be void at Law it is void in Equity; but where it is created by the Act of the Party, there in the Case of a Purchaser, or of a Provision for a Child, although the Power be not strictly pursued, Equity will help it, at least to make it good so far, as it might have been good by Virtue of the Power if it had been duly executed; as where there is a Power to make Leases for 21 Years, and the Party leases for 30, this will be made good in Equity for 21, in Case of a Provision for a Child or a Purchaser. Ante Case 220.

2d Difference, Where a Lease is made purely Voluntary, and no Provision for a Child, there if the Lease be not good at Law, it shall never be made good in Equity. But if a Lease be made to a Tenant at a Rack-Rent without a Fine, which is Voluntary, yet if the Tenant hath been at any considerable Expence in Building or Improving, there this Court will supply the defective Execution of the Power, but otherwise not.

Bayly *versus* Powell. (297.)

Lord Chancellor. Executors Trustees.

THE Case was, Eliz. Burgess, Widow, having a Brother, the Plaintiff, and two Sisters and other Relations, made her Will, and gave Legacies of 100 l. apiece to her said Brother and Sisters, and made the Defendant and one Mr. Meade her Executors, and gave Meade 50 l. and the Defendant 30 l. and left an Estate of above 1000 l. Value, more than would pay her Debts and Legacies; and the Question was, Whether the Executors or the next of Kin should have the Surplus, she having made no Disposal of it by her Will.

It was fully in Proof in the Cause, that the Executors had been always very ready to serve her, and that upon all Occasions she made use of them, and reposed all her Trust in them, and called them Fathers, and often expressed the great Kindness she had for them.

And on the other Side, that her Brother and Sisters had been very burthensome to her, she having often relieved them, and that they were very ungrateful, and that she was very much displeased with them.

But upon the whole Matter, there being no direct Proof that she intended the Surplus for the Executors, it was decreed that the Executors should account for the Surplus Estate to the Plaintiffs (the Brother and Sisters) the next of Kin, and that they should have a Distribution pursuant to the Act about Intestates Estates.

Post Case 332.

And here it was admitted, that there have been no Resolutions of this Kind but since the Act for Distribution of Intestates Estates, which now vests an Interest in the Parties intitled to a Distribution; and the first Case resolved in this Kind, was the Case of Foster and Munt, that where the Executors have particular Legacies given, and the Will is silent as to the Overplus, that then the Party is held to die Intestate as to the Overplus, and therefore that shall go according to the Statute of Distributions. And the Case of Hicks and Canning, wherein I was Counsel, was since that adjudged upon the same Reason. And a Case was cited by the Lord Chancellor, of Dashwood, where there were two Executors, and one had a Legacy, and the other nothing, and yet held to be Trustees only. But no Case hath ever yet been adjudged where no Legacy is given to the Executors. Note; It was admitted in this Case, that if a Proof could have been made of a Parol Declaration of the Testator's Intent, that the Executors should have had the Overplus, it would have been sufficient, as in Lady Gainsbury's Case.

Ante Case 266.

DE
Term. S. Hill.
1698.
In Curia Cancellariæ.

Taber *verſus* Grover & al'. (298.)

At the Rolls.

Mortgage.

Heir or Adminiſtrator.

A Mortgage was made of a Copyhold Eſtate in Fee to Mabel Porter, and her Heirs, in 1691, the Mortgagee being in Poſſeſſion, and Thomas her Heir entred, but never was admitted; in 1693 Thomas died and made the Plaintiff his Executor, and deviſed to him all his Copyhold Eſtates, and the Plaintiff likewiſe is Adminiſtrator de bonis non of the Mortgagee.

The Defendant is Heir at Law to Thomas and to the Mortgagee; and the ſole Queſtion was, Whether this Mortgage in Fee being forfeited, and the Mortgagee dying in Poſſeſſion, and Thomas her Heir enjoying it during his Life, and dying ſeiſed, whether the Plaintiff ſhould have it as Adminiſtrator de bonis non, there being no Want of Aſſets; or whether the Defendant, who was Heir at Law, ſhould have it? For the Plaintiff's Bill was to compel the Defendant to convey, and likewiſe to foreclose the Mortgagor (who was another Defendant): And the Maſter of the Rolls decreed the Defendant, the Heir, to convey, and the Mortgagor to be foreclosed, niſi, &c. and went upon the Reaſon of the Caſe of Thornburgh and Nicholls, 3 Chan. Rep. 284. which he ſaid was very well reported, and did believe that Decree was penn'd by the Lord Nottingham himſelf.

N. B.

N. B. This seems to be the strongest Case against the Heir that ever was determined, for that the Mortgage was forfeited, and the Mortgagee died in Possession, and the Heir had it during his Life, and died in Possession, and no Defect of Assets, and the Plaintiff had it as Administrator de bonis non.

Note; The Will of Thomas made nothing in this Case, for it could not operate upon the Copyhold, by Reason there was no Surrender to the Use of the Will, and considering it as belonging to him as Executor, being a Mortgage, the Will could not operate, because an Executor cannot devise what he hath purely as Executor.

(299.) Dafforne *versus* Bolt and Goodman.

Lord Chancellor.

Trust of a Term for Years.

Post Case 303.

JO. Bolt being possessed of a Term for Years, upon his Marriage with Apoline Best, assigns the same to Goodman, upon Trust for himself for Life, and after his Decease in Trust for his Wife for Life, and after the Decease of the Survivor of them, in Trust for the Heirs of the Body of the said Apoline by the said J. B. to be begotten; Jo. B. hath Issue by the said Apoline the Defendant Barbara Bolt, and dies, and then Apoline married the Plaintiff, and died, and he took Administration to her; and the Question was, Whether he should be thereby intitled to this Term, or whether the Defendant B. B. should have it as Heir of the Body? It was insisted for the Defendant, that this was the same Case with Peacock and Spooner, which was confirmed in the House of Lords, and there taken that Heirs of the Body, should not be taken as Words of Limitation, but descriptio personæ. But the Lord Chancellor said this is a Case of very great Difficulty, and he would consider of it till the next Term, and that in Case it should be determined according to the Resolution in that Case, great Absurdities would follow; and he said he had the same Case under Consideration, between Drake and Drake.

Kirk *versus* Webb. (300.)

L. C. Bec. in Cha. 84.

Lord Chancellor, Master of the Rolls, J. Powell.

Resulting Trust.

Ante Case 138.

DR. Wood Bishop of Coventry and Litchfield as Guardian or Trustee for ——— had received the Rents and Profits of her Estate, amounting to 2700l. and having laid out a great Part of the said Money in a Purchase of Lands of Inheritance died, leaving no Personal Assets to answer the said Demand; the purchased Lands descended to the Defendant; and the Plaintiff, as Administrator to ———, was intitled to the said Money; and the sole Question was, Whether these Lands, being purchased with the said Money, should be liable to answer the said Demand.

It was argued for the Plaintiff, that these Lands being purchased with this very Money, though no Trust was declared, yet it was a Trust by Implication; as if I purchase Lands in another's Name, and it appears that I paid the Money, this will be a Trust for me; for it is natural Justice that the Land being bought should be a Trust for the Owner of the Money; and it was said this would be a great Mischief, that a Guardian or Trustee, as soon as he gets a Sum of Money in his Hands, may lay it out in a Purchase, and then dies, leaving little or no Personal Estate, that the Heir shall run away with the Estate, and this Court shall not reach him. And the Case of Audley versus Audley was cited, where if a Guardian of a Lunatick purchased Land of Inheritance, this shall be but an executory Estate, and shall go to the Executor or Administrator, and not the Heir of the Lunatick. And so it was held in Case of an Infant, between Wentworth and Winchelsea, because it shall not be in the Power of a Guardian to alter the Nature of the Estate, and to turn that to the Heir which would otherwise go to the Administrator.

But on the other Side it was argued, that this could be no Resulting Trust within the Statute of Frauds and Perjuries, for that must be a Trust arising from the Construction of the Deed without any Averments; as where a Conveyance is made without Consideration, or where it appears in the Deed, that the Purchase-Money was paid by another; but if such Averments out of the Deed might be admitted, as in this Case, that the Money paid for this Purchase was not the Bishop's Money, but the

Money of the Intestate, and to make this out by Bailiffs and Receivers, this would elude the Statute which was made to prevent Perjuries, and that there could be no such Thing as a resulting Trust but what should appear by the Conveyance; and although the Mischief was great, yet there might greater Mischiefs be let in here, by couzening Purchasers or Mortgagees, and Creditors by Judgments, &c. by setting up a Trust, of which there is no Appearance but Averment, that it was bought with another's Money, which would be very hard to prove, for that Money had no Ear-Mark, but was the common Exchange, and a Man could not pretend a Property in any individual Money when it was once out of his Possession.

And general Incumbrances, such as Judgments, Recognizances, &c. would be certainly defeated after, altho' a Mortgagee or Purchaser without Notice would not be affected by such a Trust, yet a Conusee of a Statute or Judgment would, and cannot be relieved here; but this Court relieves Cestui que Trust against general Incumbrances which might affect the Estate at Law.

Trustee.

The Court were all of Opinion, that altho' this was a hard Case, yet they could not reach it, for it had never yet gon so far. And Trevor said he finds it once mentioned to have been attempted in the Case of Mears and St. John, 4 Inst. 86, but left there as a Doubt.

Guardian. Infant.

It was said in this Case, if a Guardian for an Infant puts out Money, it is at his Peril, and the Infant when he comes of Age may elect either to take the Securities or make the Guardian account for the Money; but he can not take Part of the Securities and reject the rest, but must take all or none. But whatever Profit the Guardian makes of the Infant's Money, he is accountable for it.

Ball *versus* Smith.

(301.)

Lord Chancellor. Distribution.

ONE Question was, Whether an Infant in Ventre sa mere at the Time of the Death of the Father, should be intitled unto a Share by the Statute of Distributions with the other Children? And held per Cur' clearly, that he should, for he is, in the Eye of the Law, a Child, and ought to be provided for as well as the rest; and altho' it was admitted, that a Distribution Share is an Interest vested upon the Death of the Intestate even before Distribution, and shall go to the Executor or Administrator

of

of the Party, altho' he die before Diſtribution, yet that was not ſuch an Intereſt veſted in the Children born, ſo as to deprive the afterborn Child.

It was likewiſe held, if a precedent Mortgage be upon an Eſtate ſettled for a Jointure, that the Jointreſs cannot keep this on Foot, ſo as to lay the whole Burden upon the Inheritance, but it ought to be redeemed, and the Jointreſs and the Remainder Man ought to bear their Proportion, viz. the Jointreſs a Third, and the Inheritance two Thirds. Ante Caſe 284.

It was even ſaid, and ſeemed to be admitted, that although the Husband by Law cannot be charged with the Debts of the Wife after her Deceaſe, unleſs Judgment be obtained in her Life-Time, yet where the Wife brought the Husband a ſufficient Eſtate, this Court will make him anſwerable after her Death. Baron and Feme.

Penhay *verſus* Hurrell. (302.)

A Fine levied to the Uſe of the Father for 70 Years, if he ſhould ſo long live, and after to the Uſe of Truſtees for 500 Years for particular Purpoſes, and from and after the Death of the Father, to the Uſe of the firſt Son in Tail with divers Remainders over; and the Queſtion was, Whether this Limitation to the firſt Son was not void, and that depended upon this, whether the Father ſhould have an Eſtate for Life by Implication, for otherwiſe there would be no Eſtate of Freehold to ſupport the Contingent Remainder? And my Lord Chancellor, having conſulted the Judges, ſaid they were of Opinion, that the Limitation to the Son was void, there being no Eſtate for Life veſted in the Father; but if it had been in Caſe of a Covenant to ſtand ſeiſed, it might have been otherwiſe. Contingent Remainder. Ante Caſe 286. Poſt Caſe 307, 326. } I. C.

Dafforne *verſus* Bolt and Goodman. (303.)

I. C. 2. Vern. 362.

JOhn Bolt being poſſeſt of Peachy Farm-Houſe in H. Pariſh in Worceſterſhire, and of ſeveral Lands thereunto belonging, for a long Term of Years, aſſigned the ſame to Chambers and Goodman, upon Truſt to permit John Bolt to receive the Profits for ſo many Years of the Term as he Lord Chancellor. Truſt of a Term. Ante Caſe 127, 299.

he should live, and after his Death to permit Apoline his intended Wife to receive the Profits during so many Years of the Term as she should live, and after both their Deaths, then to permit the Heirs of the Body of Apoline to be begotten by the said John Bolt, to enjoy the same Premisses for the Residue of the Term. The Marriage took Effect, and John Bolt died Intestate, leaving Issue Bolt the Defendant; Apoline his Wife took Administration, and married Dafforne the Plaintiff; and the sole Question was, Apoline being Dead, Whether Dafforne her Husband, who took Administration, should have this Term, or the Defendant, who was Heir of the Body, i. e. Whether the Words Heirs of the Body should be taken for Words of Limitation or Words of Purchase? And the Current of Opinions formerly was, that they are Words of Limitation, and by Consequence vested in the Party, and so would have gone to the Administrator of Apoline in this Case, and in the Case of Peacock and Spooner it was so held by the Lord Jefferies; but afterwards that Decree was reversed by the Commissioners, and that Reversal affirmed in the House of Lords; so that it is a Point now settled; and he said this was a stronger Case than the Case of Peacock and Spooner; for there was a farther Limitation over for Default of such Issue, which tended more to a Perpetuity; and he said in Cranmer's Case in Dyer 309. Dyer was in a Doubt, where a Limitation was to a Man for Life, and after his Death to his Executors, whether the Executors should be Purchasers; but my Lord Coke is clear, that the whole Term vests in the Testator, but doubts if such a Limitation were to the Heir. 2 Roll. 418. 1 Inst. 54. b.

Ante Case 127.

DE
Term. S. Mich.
1699.

In Curia Cancellariæ.

Browne *versus* Gibbs & al'. (304)

BROWNE and his Wife, who was the Widow and Relict of Michael Harris, deceased, Plaintiffs, brought a Bill to be relieved for Dower against the two Daughters and Heirs of the said Michael Harris, setting forth that John Harris, Father of the said Michael, made a Settlement to the Use of himself for Life, Remainder to the Use of the Defendant Sir W. Keyte, and John Harris for 99 Years, upon Trust to raise 200 l. a-piece for the two Daughters of Michael, Remainder to the said Michael and the Heirs of his Body, &c. Remainder to his own right Heirs. Lord Chancellor. Dower.

Provided that if the Heirs of the Body of Michael should pay the two Daughters 200 l. apiece at 21 or Days of Marriage, then the Term to be void.

Michael dies leaving no Issue but those two Daughters; the Plaintiffs brought a Writ of Dower, and had Judgment, but could have no Benefit at Law till the Determination of the Term, and thereupon brought this Bill to set aside the Term, by Reason, as was insisted, that the Defendants, the Daughters, were now Heirs of the Body, and the Estate vested in them, which was equal to Payment of the Money; and so the Trust of the Term being satisfied, the Term ought not to stand in the Way, Ante Case 75, 83, 285.

and it was now all one as though the Money had been paid at the Time, and then by the express Proviso it ought to have been void; but the Court would give no Relief, but dismissed the Bill without Costs. And the Lord Chancellor said he did not know any Case where a Dowager had had Relief in such a Case as this; but that Dower being an Interest that did not arise by any Contract but by Implication of Law, and it ought to stand or fall according to the Right at Law, without any Assistance of a Court of Equity, but said he did not know how it might be in Case of a Mortgage.

Sed semble a moy there is no Difference between that Case and this.

(305.)

Baker *versus* Jennings.

Copyhold devised. Ante Case 75, 128, 272. b.

A Copyholder in Fee, having Issue two Daughters, devised a Copyhold Estate to his younger Daughter, whereby her Fortune was made much more considerable than the elder Sister's; and there being no Surrender made to the Use of his Will, the Question was, Whether that Defect should be supplied in this Court? For although that Defect is generally supplied, where it is for a Provision for a Wife or Child, yet in this Case, in Case it were not supplied, her Fortune would have been equal to her other Sister's, and the Copyhold would have descended equally to them both; yet notwithstanding it was supplied here, being intended a Provision for a Child, though it made her superior to her elder Sister in Fortune, ex relatione M'r; Poley.

Lawrence *versus* Lawrence.

(306.)

Lord Chancellor Somers.

Dower.

Post Case 311.

THE Defendant's Husband had devised to her several Parts of his Estate, all together of better Value than her Dower, and had devised that the Profits of all the rest of his Estate for Years should be applied for Payment of Debts and Legacies, but did not mention that he intended it in Satisfaction of her Dower. The Defendant sued at Law and recovered at Law, though they did plead the Will, and averred that it was in Satisfaction of Dower; but the Court there was of Opinion, that no such Averment could have been admitted, unless it had been so declared in the Will. The Plaintiff being

Heir at Law, preferred his Bill to be relieved, and he was relieved; for altho' it is not declared in the Will to be in Satisfaction of Dower, yet here is that which is tantamount; for where he appoints the Profits of all the rest of his Estate for other Purposes, it is plain he never intended she should have her Dower; and in case she were admitted to her Dower, those Purposes would be defeated, and what appears to be the plain Intent of a Will by Construction is all one as tho' it had been expressed.

He had also given his Wife——hundred Pounds; and the Question was, What she should have? And Per Cur', she shall have but One hundred Pounds.

Note; That this Cause being reheard before the Lord Keeper Wright the 19th Nov. 1702, he reversed the Decree.

Penhay *versus* Hurrell.

(307.)

A Nother Point arose in this Case. A. seised in Fee, levies a Fine to the Use of B. for 70 Years, if A. lives so long, and after the Decease of A. to C. and the Heirs of his Body, Remainder to the right Heirs; and the sole Question was, Whether a Use resulted to A. for Life, for if it did not, the Limitations over were all void for want of a Freehold to support them during the Life of A. Lord Chancellor, Judge Powell. Contingent Use. *f. c.* Ante Case 286, 302. Post Case 326.

It was agreed in Case of a Covenant to stand seised, that what was not limited out of the Covenant or did continue to him; and therefore, if a Man covenanted to stand seised to the Use of the Heirs of his Body, it should be an Estate-Tail, because the Old Estate for Life continued in him; and my Lord Coke's Opinion in the Case of Fenwick and Mitford is, that it will so do in Case of a Feoffment to Uses, which Opinion was said by Judge Powel my Lord Chief Justice Hale did seem to be of in the Case of Pybus and Mitford; and my Lord Coke, when he came to be Chief Justice, continued the same Opinion, as appears 1 Rol. Rep. 239, 317. And it was said that this differs from the Case of Davis and Smith in the House of Lords, because there it appeared the Estate moved from the Wife, and so the Husband should not take an Estate by Implication; but here it was A.'s own Estate, and so the Judge and the Lord Chancellor were of Opinion, that the Use should result, according to my Lord Coke's Opinion, and 1 Inst. 22. Show. Rep.

and the rather because contingent Uses are not favoured in Law, but where it may be Remainders shall vest. But it was said the Earl of Bedford's Case seems contrary, and the Chief Justices were of another Opinion; and therefore the Lord Chancellor desired the Opinion of all the Judges, it being a Point never yet settled by any solemn Resolution. Vide Lord Paget's Case.

DE Term. S. Hill. 1699.

In Curia Cancellariæ.

(308.) Leukener *versus* Freeman.

Lord Chancellor, Master of the Rolls.

Fraudulent Deed.

MR. Mountague being indebted to several Persons upon Bond, and otherwise upon Contract, makes a Conveyance to the Defendant and other Trustees, for Payment of his Debts, mentioned in a Schedule annexed to the Deed.

The Plaintiff having brought an Action against Mr. Mountague for his too much Familiarity with his Wife, recovered 5000l. Damages, and had Judgment, but the Settlement for Payment of his Debts was executed before the Judgment entered, and thereupon he could not reach the Estate at Law, and thereupon exhibited his Bill

to ſet aſide that Deed as to him, as being Fraudulent, for that it was made with a Deſign to defeat him.

It was held in this Caſe, that Fraud is as well examinable and triable in this Court as by a Jury at Law, Fraud and Truſts being almoſt the only Things that this Court formerly took Conuſance of.

The Court held this Deed was not Fraudulent, altho' it was made with an Intent to prefer his Creditors before the Plaintiff's Judgment; and the Maſter of the Rolls cited a Cheſhire Caſe, where by the Advice of Sir Orl. Bridgman, a Man made a Settlement for Payment of his own proper Debts in the firſt Place, and to prefer them before, if not exclude, ſuch Debts for which he was bound as a Security only; and that was held to be a fraudulent Deed, only becauſe he kept that Deed in his own Cuſtody, and the Creditors had no Notice of it, or otherwiſe it would not have been Fraudulent.

But here it doth not appear where this Deed was kept, and ſo ſhall be preſumed to be in the Hands of the Truſtees, and not in the Hands of him that made it, being no Proof of either Side touching that Matter, and a Deed ſhall not be preſumed Fraudulent, unleſs it ſo appear, or be ſo proved.

DE
Term. S. Trin.
1700.
In Curia Cancellariæ.

(309.) Kingſlader *verſus* Courtney.

At the Rolls. Post Caſe 318.

JO. Greſs being poſſeſſed of a Term of 2000 Years, deviſeth the Eſtate to his Wife for 50 Years, if ſhe ſo long live, and from and after her Deceaſe, to his Son for 50 Years, if he ſhould ſo long live, and from and after his Deceaſe, to his two Grandchildren for and during the Reſidue and Remainder of the ſaid Term. One of the Grandchildren aſſigns his Intereſt in the Life-Time of the Father or Grandmother; and the Queſtion was, Whether this was ſuch an Intereſt veſted in the Life-Time of the Father or Grandmother, as was aſſignable in the Life-Time of the Father or Grandmother? It was argued, that it was not, for that it was a Contingent Intereſt, until after the Deceaſe of the Father and Grandmother, and if ſo, altho' it be ſuch an Intereſt veſted, as cannot be defeated by the firſt Deviſees, and ſuch a one as may be releaſed in the Life-Time of the firſt Deviſees, yet it cannot be aſſigned over, and ſeems to be the ſame Caſe, to this Purpoſe, as Matthew Manning's Caſe and Lampett's Caſe.

Term deviſed aſſignable.

On the other Side it was inſiſted that here is but Part of the Term carved out, viz. 50 Years and 50 Years, and the Remainder of the Term reſted in the Deviſor, which

he had Power to devise as he thought fit, and the Devisee might assign over; and in Manning and Lampett's Cases the whole Term was devised to the Party for Life, and was in him during his Life, and nothing but a Possibility in the Executory Devisee.

And the Master of the Rolls was of Opinion, that this was an assignable Interest, and that the Moiety passed by the Assignment, and he said he could not distinguish it from Welder's Case in the Commentaries; but upon Perusal of that Case, it doth not come up to this, for there was no Assignment by the Executory Devisee, but the Ejectment was brought by the Administratrix; but however the Decree was according to the Master's Opinion, ut supra.

DE

Term. S. Mich.

1700.

In Curia Cancellariæ.

Burnett *versus* Kinaston. (310.)

Baron and Feme. Choses in Action.

MAJOR Burnett married Mary Eaton, who had a Mortgage in Fee for 1400 l. and other Debts due upon Securities.

Major Burnett, after Marriage, covenants with the Relations of Mary Eaton, that the Money due upon the Mortgage should be laid out in the Purchase of Lands of Inheritance, which should be settled to the Use of Major Burnett for Life, Remainder to Mary Eaton his Wife

Wife for Life, Remainder to the Heirs of her Body by him, Remainder to the Heirs of her Body by any other Husband, Remainder to the Right Heirs of the said Major Burnett.

The Wife was Dead without Issue, the Money being not laid out, but continuing upon the said Mortgage.

The Plaintiff is the Heir at Law of Major Burnett, and prefers his Bill to have this Money; the Defendants are the next of Kin and Administrators of the Wife, and also Heirs at Law to her; and the Question was, Who had Right to the Money?

For the Plaintiff it was insisted, that the Money due upon the Mortgage was bound by this Covenant of the Husband, and tho' the Money was not laid out in a Purchase, yet in a Court of Equity it should be all one, and the Money should go as the Land would have gon, in case the Money had been laid out, and that without all Question, would have been to the Plaintiff, who was Heir of the Husband; and that altho' this was a Chose in Action, yet the Husband had an absolute Power of it, for he might have released it, or have sued for it and recovered it, and so might have done what he had pleased with it.

For the Defendants it was insisted, that this was a Chose in Action, which being not altered, would go to the Administrator of the Wife, and not to the Husband, and the Husband could claim it after the Death of his Wife, in no other Manner than as Administrator to his Wife; and though in this Case the Husband did survive the Wife, and did administer to her, yet dying before the Property was altered it will go to the Administrator de bonis non of the Wife; and they also had a legal Right in this Case, being Heirs at Law to Mary Eaton, so that the legal Interest of the Mortgage in Fee was vested in them. And a Difference was taken between an absolute Right and a temporary Right. Where a Man had an absolute Right, there his Covenant or Agreement should bind, but where he hath only a temporary Right, there he must execute his Power in that Time, or else it would be ineffectual; as where a Joint-tenant agrees to convey his Moiety, and dies, the Survivor shall be bound by it, because he hath an absolute Right in the Moiety.

But the Husband hath only a temporary Right to the Choses in Action of the Wife, and therefore, unless he

doth alter the Property in that Time, viz. during his Life, the Right will go to the Wife or to her Administrator.

Cur': That the Defendants are intitled to the Money due upon this Mortgage, and it is not bound by this Agreement of the Husband; it is true that the Husband might have released, or have sued for it and recovered it, and then the Property had been altered; but as now it is it remains a Chose in Action, and shall go to the Administrator of the Wife.

The Husband hath an absolute Property in all Chattels Personal of the Wife by the Marriage.

As for Chattels Real, viz. Leases for Years, he hath Power to alien or dispose of them, but if he doth not, they survive to the Wife, and if the Husband survives he shall have them.

As for Choses in Action he may release them, but if he neither releases nor recovers them, if the Wife survives she shall have them, and if he survives he shall not have them without taking Administration to his Wife. Ante Case 223. Post Case 331, 353.

If the Husband assigns over a Bond due to the Wife, this will not bind her if she survives.

As for the Case of Joint-tenants, he did not know how far the Covenants of a Joint-tenant might bind the Survivor, but if a Joint-tenant shall grant a Rent-Charge, this shall not charge the Survivor, and he did believe a Bill was never brought to make that binding.

Mr. Attorney, who was for the Plaintiff, agreed that if a Joint-tenant devised, it was void, but the Reason of that was, because a Will did not take effect till the Death of the Party, and then the Interest was vested in the Survivor.

But the Lord Keeper being of Opinion, that the Property of the Money was not altered by the Covenant, so the Bill was dismissed.

Hitchins *versus* Hitchins. (311.)

THE Plaintiff having recovered her Dower at Law, preferred her Bill to be let into it, and particularly to set aside a satisfied Mortgage which was kept on Foot, and set up to keep her out of Possession. Lord Keeper. Dower.

It was insisted for the Defendant, that a Woman shall have no Relief for her Dower in Equity, in Case the

Party can bar her at Law, because it is not due to her by any Contract or Agreement, but she is to get it as she can; and cited the Case of the Lady Radnor, and Vandebende, where a Term to attend the Inheritance shall keep her out of her Dower; and it was so settled in that Case upon an Appeal to the House of Lords.

But per Cur': This satisfied Mortgage shall not stand in her Way, and decreed it to be set aside, and thought the Case of Vandebende a hard Case.

Another Point was stated, that the Husband by his Will had devised to his Wife a Part of his Estate, much better in Value than her Dower, but did not say in Bar of her Dower; and the Question was, Whether this should bar her in Equity? and they cited the Case of Lawrence and Lawrence, ante Case 306. that it should.

But per Cur': It shall not, for whatsoever is given her by Will shall be intended a Bounty, and not in Satisfaction of what was her Right, unless it had been so expressed.

DE

DE
Term. S. Hill.
1700.
In Curia Cancellariæ.

Yate *versus* Fettiplace. (312.)

S. C. 2. Vern. 416. Rec. in Cha. 146. 12. Mod. 276. 1. L. Raym. 508. Mylon. Mss. R. vol. A.

SIR Rowland Lacy having mortgaged Part of his Estate to Colonel Heyton for 1000 Years, for securing 6000 l. made a Settlement of his Estate to himself for Life, Remainder to his Son and the Heirs of his Body, Remainder to his own Right Heirs, and afterwards made his Will, and thereby gave his Daughter Arabella 4000 l. for her Portion, if she marry with Consent of her Mother, (otherwise but 1000 l.) to be paid at her Marriage or Age of 21, and appointed that the mortgaged Term should be kept on Foot for the better raising of the Legacies. Arabella dies at the Age of six Years, the Lady Lacy, her Mother, took out Administration, and married Mr. Yates the Plaintiff, and afterwards made her Will, and Mr. Yates the Executor thereof, who took also Letters of Administration to the said Arabella; and the sole Question was, Whether Mr. Yates, as Administrator to Arabella, was intitled to the said 4000 l. or any Part thereof, or whether the Legacy was sunk for the Benefit of the Heir, Arabella dying before Twenty-one or Marriage? Lord Keeper, Master of the Rolls.

And they both agreed that this Legacy was sunk for the Benefit of the Heir, it being by the said Will to be raised out of Land, in as much as he appointed the mortgaged Term of 1000 Years to be kept on Foot for raising of his Lega- Legacy to the Administrator.

Legacies; and since my Lord Fawlett's Case, it hath been the constant Practice of this Court, that where a Legacy or Portion by Will or Deed is appointed to be raised out of the Lands, there if the Party dies before it is payable, it shall sink for the Benefit of the Heir.

Post Case 322.

And although the Mortgage Lease, out of which it is to be raised, be but a Term for Years, yet it is not a Term in Gross but a Term attendant upon the Inheritance after the Debt paid and the Trusts performed; if it had been a Term in Gross it had been a Chattel and Personal Estate, but it is not so here.

It was agreed that a Legacy out of Land is not recoverable in the Ecclesiastical Court, no more than they can sue there for any Trust concerning Land which they have no Power of.

Hob. 265.

And the Lord Keeper held, if this had been a Legacy to be paid out of the Personal Estate, the Plaintiff could have had no Title to it, because it is given upon a Contingency, which not happening in the Life-Time of the Legatee, was never vested in her, and so could not go to the Administrator, for she never married nor came to the Age of 21, and this is a Condition precedent, and all one as if he had said, if my Daughter marry with Consent of my Wife, I give her 4000 l.

The Reason why a Legacy or Portion, charged upon Land, shall sink in the Estate for the Benefit of the Heir, where the Party dies before it becomes payable, and that not to do so when it is charged upon the Personal Estate, is because the Heir is more favoured at Law and in this Court than an Executor or Administrator, and because the Heir is looked upon to be the Stay of the Family and the Support of it, when an Executor or Administrator is sometimes a mere Stranger to the Family, as in this Case. If a Legacy be given to a young Girl when she marries, and she marries before she is viri potens, she shall not have it, for it must be intended a complete Marriage.

And the Lord Keeper said he saw no Reason for the Difference which is commonly made between a Legacy given to A. to be paid when she shall come to the Age of 21, and a Legacy given to her when she shall come to Age, for he said it seemed very absurd to make two different Constructions, when it cannot be thought but the Testator must mean the same Thing.

Dyer 59. Godolp. 281. Swinb. 300.

And altho' it was here insisted upon, that this Portion is charged to be raised out of the mortgaged Term, which is a Chattel, and by Consequence, Testamentary; yet it was

answered that it is not a Term in Gross, but, when the Debts and Portions are paid, is attendant upon the Inheritance, and such a Term is not forfeited as a Personal Estate or Chattel in Gross is.

William Bromley, Esq; *versus* Fettiplace. (313.)

S. C. 2. Vern. 486. Free. in Chanc. 138.

Lord Keeper, Master of the Rolls.

SIR Rowland Berkley having Issue only Daughters, settled his Estate upon Trustees to sell, subject nevertheless to a Power of Revocation; afterwards upon the Marriage of his Daughter with the Plaintiff, by Deed, reciting that his Intent was, that the Manor of Cotteridge in Question, should go to the Issue Male of the Plaintiff, he thereby agreed, that if the Plaintiff should be minded to purchase the same to him and his Heirs, he should have it for 1500 l. cheaper than the best Purchaser would give for the same.

Sir Ro. Berkley afterwards made his Will, and gave the Complainant 1500 l. to be raised out of this Manor, but did not mention whether it should be in Satisfaction of the 1500 l. agreed to be allowed the Plaintiff in case he would purchase the same.

The Plaintiff preferred his Bill to have the Agreement executed, that he might purchase the said Manor, and have an Allowance of the 1500 l. And here two Questions were made.

1st Question, Whether this Agreement ought to be executed in Specie upon the Deed of Covenant, as it so stood, without any Relation to the Will?

2d Question, Whether the 1500 l. given by the Will, should be intended in Satisfaction of 1500 l. agreed to be allowed the Plaintiff, in Case he should purchase?

To the first Question it was held, That as it stood barely upon the Deed, this Court would not execute this Agreement in Specie, for this Court will not execute all Agreements in Specie, but will consider, upon Circumstances relating to the said Agreement, the Reasonableness and Equitableness of executing the same, and will in many Cases leave the Party to his Remedy at Law to recover Damages only for not performing the said Agreement.

And the Reason why they would not execute it in this Case, was, because as it appear'd upon the Face of the said Agreement it would not answer the Intent of it, it

being declared by the said Sir Ro. Berkley in the said Agreement, that it was intended that this Manor should go to the Issue Male of Mr. Bromley, and Mr. B. having been married 22 Years, and having no Issue Male, it was plain the main End of the Agreement would not be answered by an Execution in Specie.

Agreement in Specie.

And it was said by the Lord Keeper, for another Reason he could not be for executing it, because he looked upon it as impracticable for Mr. B. to have it at 1500 l. less than the best Purchaser would give, because it was impossible to know what the best Purchaser would give; for it could not be exposed to Sale before a Master to the best Purchaser, because whoever should bid for the Estate was not to have it, because Mr. B. was to have it 1500 l. cheaper.

It was said, that generally this Court will not execute an Agreement in Specie, but when the Agreement is such that an Action at Law will lie for Damages for the Non-performance of it.

But in some Cases that will not hold; for if a Marriage Agreement should be so ill worded, that an Action would not lie at Law for the Breach of it, yet this Court will Decree a Performance.

And sometimes (per Master of the Rolls) subsequent Accidents discharge the Execution of an Agreement in Specie, and cited the Case in Fitzherbet, Subpœna 23, cited in Shelley's Case, 1 Co. 100. where a Man being sick directed his Trustees to convey to his Daughter, and afterwards had a Son born, and dies; the Trustees shall convey to the Son, and not to the Daughter.

And he held likewise that Mr. Bromley might have discharged this Agreement by Parol, in as much as it was said, if he should be minded to purchase, &c.

To the second Question, Whether this 1500 l. given by the Will, should be intended in Satisfaction of the 1500 l. mentioned in the Agreement, or whether Mr. B. should have both? And it was clearly held that he should not, in as much as the 1500 l. is to be raised out of the same Lands, and the Lands are thereby otherwise disposed of, so that it could not be intended by Sir R. B. that he should have both.

Averment out of the Will.

But a Question arose, Whether the Plaintiff should be admitted to read Witnesses to explain the Testator's Meaning in that Particular? And alledged that it might be so done; the Question being only touching the Personal Estate, though it could not be so in a Will touching Lands, because by the Statute such Will must be in Writing, and

no Averment ſhall be received out of the Will, but as to a Perſonal Eſtate it had been ſo done in my Lady Gainſborough's Caſe in this Court.

To which it was anſwered per Cur', That what was read there was in Affirmance of the Law upon the Will, which was to carry the Perſonal Eſtate to the Executor, and that Caſe ſtood ſingly by it ſelf. But in the Caſe of the Lord Falkland and Cary it was denied that Letters ſhould be read to explain the Agreement, though it was then inſiſted on that Letters were in Writing, and ſo more certain.

And the Maſter of the Rolls cited the Caſe of Leake and Randall, in Vernon's Caſe, in the fourth Report, that a Collateral Thing deviſed by a Will, could not be averred to be in Satisfaction of Dower, unleſs it did appear ſo to be by the Will; but here the 1500 l. deviſed was not collateral, becauſe it was to ariſe out of the ſame Land. Averment.

The Plaintiff's Bill was diſmiſſed as to the Executing of the Agreement in Specie, but was offered a Decree for the 1500 l. Legacy, but then was to be injoined from proceeding at Law, and had Time to conſider whether he would take it or not.

Phillips *verſus* Phillips.

p. 58. Mich. 1705. R. vol. A. (314.)

IT was held by the Lord Keeper, that if a Legatee accepted of the Executor a Bill upon a Goldſmith, and the Legatee did not demand the ſame of the Goldſmith, and after the Goldſmith breaketh, that in this Caſe the Loſs ſhall be to the Legatee; but if the Legatee demandeth it in convenient Time, and the Goldſmith doth not pay it, but breaketh, then it ſhall not go for Payment, but the Legatee may reſort back to the Executor for his Legacy. And it was ſaid in this Caſe, that four or five Days ſhould be a convenient Time for this Purpoſe. Bill on a Goldſmith. Poſt Caſe 324.

DE

DE
Term. Paſch.
1701.
In Curia Cancellariæ.

Herne *verſus* Herne.

(315.) ALTHO' it appeared by the Inteſtate's own Books, that Money, which he received as Truſtee, was actually inveſted in the Purchaſe of Lands, which, if it had not been inveſted, would have been ſubject to the Act of Diſtribution, that yet thoſe Lands were not liable to be diſtributed; and cited the Caſe of Kirk and Webb, affirmed in the Houſe of Lords. Ante Caſe 300.

DE
Term. S. Trin.
1701.
In Curia Cancellariæ.

Squier *verſus* Mayer. (316.)

HELD that a Furnace tho' fixed to the Freehold, and purchaſed with the Houſe, and alſo Hangings nailed to the Walls, ſhall go to the Executor, and not to the Heir, and ſo determined, contrary to Herlakenden's Caſe, 4 Co. q' il dit neſt ley quoad præmiſſa. Lord Keeper. Heir and Executor.

Ducheſs of Cleveland *verſus* Executors of Geo. Daſhwood. (317.)

THE Ducheſs having 4700 l. per Ann. granted to her and her Heirs by King Charles II. out of the Exciſe or Cuſtoms, and having Occaſion to borrow a Sum of Money, Mr. Grey, who was Gentleman of her Houſe, procured the ſame of one Rogers a Scrivener, who was imployed to let out Money for the ſaid Executors, and gave him 100 l. for Procuration; the Security given for it was out of this 4700 l. per Ann. a Proportion whereof was ſet apart, to be Yearly applied towards this Debt, till the whole Principal and Intereſt was diſcharged. Lord Keeper, Maſter of the Rolls. Scivener. Ante Caſe 287. Poſt Caſe 359.

Mr. Rogers had received 2900 l. for the Uſe of the Executors, and gave his Receipts accordingly, and had ac-

counted to the Executors for above 1700 l. but about 1100 l. remained in his Hands unaccounted for, and he died insolvent; and the only Question was, Whether this Loss should fall upon the Duchess of the Executors?

And it appearing that Mr. Rogers was Agent for the Executors, not only in this but in other Affairs, and that he transacted this Matter on their Behalfs, save the Writings executed, and paid the Money lent, and the Money was appointed to be paid at his House, and the Writings being left with him, and for all that appeared continued at his House; they were both of Opinion, that the Loss ought to fall upon the Executors, and not upon the Duchess, who, for all that appeared, was an utter Stranger to Rogers before the Borrowing of this Money.

And the Master of the Rolls took the Distinction which he said had always been allowed; that if a Bond be left with a Scrivener, that is sufficient for him to receive the Principal and Interest, and the Delivery up of the Bond is a sufficient Discharge to him that pays it.

But if a Mortgage were left with a Scrivener, this is a sufficient Authority to him to receive the Interest, but not the Principal, and the Delivery up of the Mortgage by him is no sufficient Discharge to the Mortgagor, because the Estate ought to be reassigned, which cannot be done but by the Party himself.

But the Lord Keeper said he saw no Reason for this Difference, but that in Equity it would be all one, the Money being really paid to the Person who had the Deeds in his Custody; but the Master of the Rolls seemed to be of a contrary Opinion.

But however, here the Money was to be paid by Instalments, Principal and Interest together, and it was plain he had accounted for Part to the Executors, and no Countermand had ever been given, and therefore thought it reasonable that what was paid to Rogers should be allowed to the Duchess on Account, her Bill being to redeem.

(318.)

Kimpland *versus* Courtney.

Lord Keeper. Upon an Appeal. Ante Case 309. Possibility assigned.

A. Possessed of Lands for a Term of 1000 Years, deviseth the said Lands to B. for 50 Years, if she shall so long live, and after the Decease of B. deviseth the same to C. and C. assigns his Interest to D. and the Question was, Whether this Assignment was good?

It was objected that it was not, because it was but a Possibility, because in the Eye of the Law an Estate for a Man's Life is greater than a Term for Years, and the Length of the Term will not alter the Case; and altho' by Presumption the Term for fifty Years would last longer than the Life of B. yet B. might out-live the Term, and then he was to take an Estate for Life by the Devise; and altho' in Lampett's Case and Matthew Manning's Case, it was held that a Term might be devised to one for Life, the Remainder to another, yet it is there held that the Remainder Man had but a Possibility, which was not assignable.

But the Lord Keeper, having taken Time to consider of the Case, held the Assignment to be good, and said this was a stronger Case than Lampett's, because the first Devise being for a Term for fifty Years only, the Devisor had a Remainder in him for the Residue of the Term; but in Lampett's Case the Devise being for Life, the Devisor had nothing but a mere Possibility; and he said this is the Case of Sheriff and Wrotham, 2 Cro. 509. and was like Locroft's Case, cited in the Rector of Chedington's Case. 1 Co. 155. 1 Lev. 45.

And he held that B. took no Estate for Life by Implication, but in Case he had over-lived the fifty Years, then the Executor of the Devisor should have held it during the Life of B. as when a Devise is made to A. and the Heirs Male of his Body, if he dies without Issue, then to B. and his Heirs, this will not enlarge the Estate of A. so as to make him Tenant in Tail general, for he shall have it only to him and the Heirs Male of his Body.

DE

DE
Term. S. Mich.
1701.
In Curia Cancellariæ.

S.C. 1. Eq. Cas. (319.) Abr. 302.

Shales *versus* Shales.

Lord Keeper.

Provision and not a Trust.

JO. Shales the Father, having several Sons, purchased the Inheritance of several Houses, &c. in the Name of his second Son, and died; and the youngest Son, who by the Custom of that Place is Heir at Law, preferred his Bill against the second Son, to have a Conveyance of the Estate to him, alledging that the second Son was only a Trustee for his Father, and that he being Heir to his Father, was intitled to have an Execution of the Trust, and a Conveyance to him and his Heirs.

It was plain in this Case, and so proved, that the Father paid all the Purchase Money, and that he had laid out great Sums of Money in building upon it and improving it. On the other Side it was proved that the Father, before he purchased, declared he intended it for his second Son, and some other parol Discourse to that Purpose.

Cur': Dismiss the Bill, for that it is a settled Rule in this Court, that whenever a Father purchaseth in the Name of a Child unprovided for, it is intended a Provision and not a Trust, unless it be otherwise proved, and the Proof lies on the other Side; and it was also before the Statutes of Frauds and Perjuries, and is stronger since, because Declarations of Trust ought to be

in Writing, tho' in other Cases a Trust will result where it appears that another paid the Money.

A Man made a Lease of a Piece of Ground, and the Lessee covenanted to build, and having Occasion for Money, mortgaged his Lease by Assignment, and died insolvent, and the Lessor preferred his Bill against the Mortgagee, to compel him to build and to execute this Agreement in Specie; and it was decreed that the Mortgagee should build according to the Agreement of the Mortgagor, so that he could not quit the Lease, though he would be content to lose his Money, prout dict fuit al moy per M. Poley. (320.) Master of the Rolls.

DE
Term. S. Trin.
1702.
In Curia Cancellariæ.

Earl of Kildare *versus* Kent, & econt'. (321.)
S. C. 2. Vern. 435. Bee. in Chanc. 190.

RIchard Kent having devised his Real and Personal Estate to his Executors, for Payment of Debts and Legacies, and the Creditors having preferred their Bill to have Satisfaction of their several Debts out of the said Estate; upon hearing of the Cause it was decreed that the several Creditors should come in before the Master, and prove their Debts, and receive Lord Keeper. Debts paid Share and Share alike without Preference. Post Case 339.

ceive Satisfaction for the same out of the Testator's personal Estate, according to the Course of Law in Payment of Debts by Executors or Administrators; and there being 800 l. in the Master's Hands, to be distributed among the Creditors, as the Court should direct; and the Creditors having preferred their Petition to have the Direction of the Court therein, it was insisted for some of the Creditors, that they had obtained Judgments for their Debts, that they ought to be preferred to Creditors by simple Contract. And on the other Side it was insisted, that the Testator at the Time of his Decease owed no Debt upon Judgment, and that they, who had obtained Judgments by Contrivance against the said Jo. Kent, did by their Bill charge themselves to be Creditors by Bond only, and that the Bill was brought on Behalf of themselves, and all other the Creditors of the said Testator; and did hope, that the said Testator's Estate should be applied for Satisfaction of his Debts, according to his Will, and should go accordingly without Preference, Share and Share alike; and that they who had got Judgments should not make Use of the same to defraud the rest of the Creditors: Whereupon it was ordered, that the said Testator's real and personal Estate should be applied amongst the Creditors Share and Share alike, without Preference.

(322.) Brewen *versus* Brewen.

Lord Keeper.

Portions charged upon Land.

MR. Brewen, upon his Marriage with Sir F. Winnington's Daughter, in Consideration of 4000 l. Portion, settled his Estate of 400 l. per Annum, to the Use of himself for Life, Remainder to his intended Wife for Life, Remainder to Trustees for 1000 Years, with Remainder to the first and other Sons in Tail Male successively, Remainder to his own right Heirs.

The Trust of the Term for 1000 Years was declared to be, That in case he should leave no Issue Male, who should arrive to the Age of Twenty-one, or in case the Issue Male should die unmarried, then to raise 3000 l. for such Daughters, to be paid within one Year after the Death of the Father or Mother.

He having Issue by his Wife one Daughter only, the Lands settled for Jointure being incumbred, deviseth Part of the Jointure Lands to his Wife in Fee, upon Trust, that after she should make up her Jointure 400 l. per Ann. and should raise 3000 l. for her Daughter as a Portion, and after the

the ſaid Jointure made up, and the ſaid 3000 l. raiſed or ſecured, that then ſhe ſhould convey the Inheritance of what ſhould remain to his Brother B. Brewen.

The Daughter preferred her Bill to have this 3000 l. paid or ſecured, and pending the Suit died, being about five Years of Age; and the Mother, as Adminiſtrator to her Daughter, revived the Suit: And the main Point was, whether this Portion of 3000 l. ſhould merge for the Benefit of the Heir at Law, the Daughter dying an Infant, or whether the Mother ſhould have it as Adminiſtrator to her Daughter?

And it was admitted on all Sides, that as it ſtood upon the Deed of Settlement, the Portion ſunk for the Benefit of the Heir at Law, the Daughter dying before it became payable, according to the Lord Pawlett's Caſe, which was affirmed in the Houſe of Lords; and that Point hath ever ſince been a ſettled Point: And ſo it was held alſo in the Caſe of Bond and Bond, and of Yates and Fettiplace, which Caſes went up to the Houſe of Lords, and were there reſolved accordingly.

And as it ſtood upon the Will, it ſeemed to be relative to the Settlement, becauſe the Words immediately foregoing, viz. To make up her Jointure, muſt relate to the Settlement, or elſe were not intelligible: And this ſeems to be a farther Security for the Portion mentioned in the Settlement; and altho' no Time be limited in the Will for the Payment of it, yet a Time being limited in the Settlement, the Time ſhall be intended the ſame.

But if a Portion had been appointed by the Will, without Relation to the Settlement, and no Time had been appointed for the Payment of it, it muſt have been payable preſently.

But the Lord Keeper ſeemed to hold, that if it had ſtood ſingly upon the Will, yet being mentioned for a Portion, and the Daughter died before ſhe was marriageable, it ſhould have merged for the Benefit of the Heir, and no Difference when a Portion charged upon Lands of Inheritance is given by Will, or when it is by Settlement; for in both Caſes it ſhall merge for the Benefit of the Heir, tho' formerly it was held it would not do ſo in the Caſe of a Will: But that was ſince reſolved in the Caſe of Smith and Smith; and that when it is given for a Portion, altho' no Time limited, yet it ſhall not be paid till the Party is capable of Marriage.

And it was held by the Lord Keeper, and agreed by the Maſter of the Rolls, that where a Portion is by Deed or Settle-

Settlement made payable at Eighteen or Marriage, and no Provision for Maintenance in the mean Time, there if the Father dies before the Portion is payable, this Court may allow a Maintenance, and did in this Case allow the Mother after the Rate of 100 Marks per Ann. for so long as the Daughter lived after her Father.

But it was agreed on all Hands, that where a Legacy is given out of a personal Estate payable at Twenty-one or Marriage, and the Legatee dies before, it shall go to the Executor or Administrator.

And if no Time of Payment is mentioned, it is payable presently: And the Lord Keeper seemed to be of Opinion, that the Maintenance should be out of the Interest of the Portion; and that where it was payable in futuro, the Court might order it to be put out at Interest, and the Maintenance to be paid out of the Interest.

(323.) Fothergill *versus* Fothergill.

Lord Keeper, Master of the Rolls.

Power defective supplied. Ante Case 113, 137, 296.

ABR. Fothergill having an Estate in Yorkshire and Durham, settled his Estate to the Use of his Son Thomas for Life, with Remainder over, with a Power for Thomas to limit any Part of the Estate, not exceeding 100 l. per Ann. for a Jointure for any Wife he should marry: The Lands in Durham being 180 l. per Ann. and charged with 100 l. per Ann. to the Widow of Abr. F. for her Life, he limits the 100 l. per Ann. out of this Estate (which being charged with the 100 l. per Ann. was not sufficient in Value) and covenants in the Deed, that in Case the Value should be defective, that it should be made up out of his other Estate; and the Estate being defective, the Widow brought her Bill to have it supplied out of the Yorkshire Estate: And it was decreed that it should so be.

And it was held by the Lord Keeper and Master of the Rolls, That whenever a Conveyance is made upon a good Consideration, if there be any Defect in the Execution of it, that this Court hath always supplied the Defect; as in Case of a Feoffment, to supply the Defect of Livery, in Devise of a Copyhold, to supply the Defect of a Surrender; and much more in case of a Power, as where any Circumstances are omitted in the Execution of it: And one Reason given was, because the Circumstances are imposed only, that the Party may not be surprised in the Execution of it.

And it was further held, that Payment of Debts, Provision for a Wife and Children, Marriage or Purchases, were Considerations for which this Court had supplied such Defects: And tho' Provisions for Wife or Children after Marriage are not valuable Considerations, yet they are good Considerations, and were always helped in this Court; and therefore where a Devise of a Copyhold was made to a younger Son without a Surrender, he was always relieved against the Heir at Law; altho' it was objected, that the Heir at Law is as nearly related as his Brother, and having the Law of his Side, this Court ought not to interpose, but the contrary hath been always held; and so the Plaintiff here was relieved, the Husband having covenanted that, in case these Lands were not sufficient, it should be made up out of the other Estates which he had a Power of, altho' he was only Tenant for Life of them. 3 Chan. Rep. 263.

Crawley *versus* Crowther. (324.)

IT was held and admitted, that if a Man receives a Goldsmith's Bill in Payment for Money, and he that receives the Bill never demandeth it in three or four Days Time at the most, and afterwards the Goldsmith breaketh, that this Neglect shall occasion the Loss to fall upon the Receiver; but if the Goldsmith breaketh in three Days Time, the Loss shall fall upon him who gave the Bill for Payment; for altho' taking a Goldsmith's Bill is Payment prima facie, yet it is subject to that Contingency, that the Bill may be had if it be demanded in three Days Time; and that the Lord Keeper said was the Practice in Guildhall, when he practised there; and it was said to be so held in a Case between Phillips and Phillips, heard by the Master of the Rolls, that accepting a Bill is no Payment, if the Money be afterwards lost without any Default of him that taketh it: But in this Case the Plaintiff was offered his Choice at the Goldsmith's Shop, to have either his Money or a Bill, and he chose a Bill, and the next Day the Goldsmith broke; and therefore the Loss fell not upon the Party who paid the Money, but upon the Plaintiff; for it was his own Fault that he would not take his Money. Lord Chancellor. Bills upon Goldsmith accepted in Payment. Ante Case 314.

It is now likewise held, and the Practice is so, that if a Man gives a Note for Money payable upon Demand, he need not prove any Consideration.

If a Bill be payable to A. or Bearer, it is like so much Money paid to whomsoever the Note is given, that let what Accounts or Conditions soever be between the Party who gives the Note, and A. to whom it is given, yet it shall never affect the Bearer, but he shall have his whole Money.

(325.)

Price *versus* Perrie.

Lord Chancellor.

Mortgage redeemable.

Ante Case 79, 95.

IT was held, that if an Estate mortgaged be once redeemable, it shall always be so till released or foreclosed: As if a Mortgage be made with a Condition, that if the Mortgagor pays the Money at any Time during his Life, the Mortgagee shall reconvey: This may be redeemed by his Heir after his Decease, notwithstanding the Redemption is limited to the Mortgagor during his Life only.

Ante Case 280. b.

So if a Mortgage be made redeemable, upon Payment of the Mortgage-money at a certain Day, but if the Money be not then paid, that if the Mortgagee will pay a further Sum to the Mortgagor, that then his Estate shall be absolute, or that he will make him a further Conveyance, or any Thing to that Effect, this Estate is notwithstanding redeemable after the Day of Payment, and the Mortgagee cannot enforce the Mortgagor after Default to make him an absolute Estate, until he forecloses him.

(326.)

Penhay *versus* Hurrell.

Vide Lord Bedford's Case, Poph. 3.

Ante Case 286, 302, 307.

THE Lord Keeper, after Consideration had, and a Case being stated, gave his Opinion, that A. had an Estate for Life by Implication, and so the Remainders all good, there being a Freehold to support them; and he went upon the Case of Pybus and Mitford, in 1 Mod. Rep. 159. and brought the Book into Court, where it seems to be the Opinion of my Lord Coke and Hale, that as well in a Fine or Feoffment, as in a Covenant to stand seised, so much of the Use, as a Man did not depart with, remained in him; and so he said is the 1 Inst. 22. and gave Judgment accordingly. †

N. B. If this Resolution holds throughout, there can hardly be any such Thing as a contingent Remainder; for if a Freehold be not limited away, it remains in the Feoffor, in case of Feoffment, and so will support any contingent Limitation.

† See q. case of Adams & q. tenant by Curtesy in 2. L. Raym. 854. which seems contra. See reports in 2. Vern. 372.

See further Vin. Abr. Remainder C. 3. pl. 1. pl. 595.

Lady

Lady Holcroft *verſus* Smith. (327.)

A Queſtion ariſing whether an inrolled Deed ſhould be Evidence without further Proof, a Difference was taken where the Eſtate paſſeth by the Inrollment, as in a Bargain and Sale, there it is an Evidence; but where it is only for ſafe Cuſtody, there is not otherwiſe than againſt the Party who ſealed it, and all claiming from, by or under him, and ſo far it ſhall.

Lord Keeper. Inrollment. Evidence. Poſt Caſe 329. 3 Lev. 388.

Mrs. Aſh's *Caſe*. (328.)

SHE being found a Lunatick, the Cuſtody of her was granted to Mrs. Windham her Siſter, and being in Cuſtody, Mr. Packer by Force breaks in upon her Keepers, and gets her to Church, and there marries her: And it was held in this Caſe,

Lunatick.

1ſt, That the Marriage of a Lunatick doth not determine the Cuſtody of her, for the Cuſtody may be continued notwithſtanding the Marriage; and if a Woman that is married afterwards becomes lunatick, the Cuſtody of her may be granted: And ſo it was done in the Caſe of Mr. Fane of the Temple; the Wife having a ſeparate Power, by Inquiſition was found a Lunatick, and the Cuſtody of her granted at firſt to ſome Friends of Mr. Fane, and afterwards to Mr. Fane himſelf, and ſo now continued.

2dly, It was held, that a Lunatick during his Lunacy is not capable of Marriage, but in lucid Intervals he may; and if ſuch a Marriage ſhould be had during the Lunacy, the Civilians held, that by ſubſequent Conſent it might be made good, as the Marriage of an Infant before the Age of Diſcretion, may be made good by a ſubſequent Aſſent.

3dly, That the Prerogative of the Crown touching Idiots and Lunaticks, was Regium Munus, before the Statutes for that Purpoſe; and it was a Duty originally incumbent on the Crown to take Care of thoſe who were not capable of taking Care of themſelves.

4thly, That if a Lunatick recovers his Senſes, he ought to be delivered out of Cuſtody, and for that Purpoſe may petition to be inſpected; but that it was not to be tried by Inſpection only, but by examining Witneſſes alſo, to ſee whether

ther her being reſtored to her Senſes was of any Continuation, and ſo like to hold.

One Greno's Caſe was cited, who married during his Lunacy and Commitment, and afterwards that Marriage was diſſolved in the Spiritual Court, in my Lord Somers's Time; and my Lord Coke's Opinion denied, that a Lunatick is capable of Marriage.

In this Caſe Mrs. Aſh and her Husband, and the Parſon and Mr. Packer, were committed for their Contempt to the Court, in carrying on this Matter whilſt ſhe was in the Cuſtody of the Court; but ſhe and her Husband were committed together, for it appeared that ſhe was mightily recovered per conſortium mariti, and was very ſedate in Court, but not diſcharged till further Trial.

(329.) Lady Holcroft & al' ver. Smith.

Evidence.

Ante Caſe 327.

NOTE; A Settlement of Sir G. Bineon, under which the Plaintiffs (who were his Siſters) claimed, being loſt, but being proved in Chancery by the Plaintiffs themſelves thirty Years ſince, who were not then concerned in Point of Intereſt, but are ſince intitled by that Deed; it was ordered that a Copy of the Deed ſhould be admitted to be read at Law, and likewiſe that the Plaintiffs Depoſitions ſhould be read to prove the Deed, altho' they now claim under the Deed.

DE
Term. S. Mich.
1702.

In Curia Cancellariæ.

Chaſe *verſus* Box.

(330.)

IT was held, that if a Man is indebted to another for Principal and Intereſt, and payeth Money generally, that it ſhall be applied in the firſt Place to ſink the Intereſt before any Part of the Principal ſhall be ſunk. Lord Keeper. Payment of Money, how applied.

And ſo it was held by the Lord Keeper upon the ſame Reaſon, that if a Man oweth Money upon Bond which carrieth Intereſt, and a Book-debt which carrieth no Intereſt, and payeth Money generally, it ſhall be applied in the firſt Place for Payment of the Book-debt: But that was denied at the Bar, becauſe when a Man payeth Money, it ſhall be applied as he intends that pays it; and therefore where both Parties are ſilent, it ſhall be intended in Diſcharge of that which is moſt beneficial for him that pays it, and that ſhall be to ſink the Debt which carries Intereſt; and ſaid there were Precedents for it.

But it was agreed of all Hands, that if at the Time of the Payment of Money, he that receives it declares that he receives it upon one Account, and he that pays it declares that he pays it upon another Account, there it ſhall be applied according to the Declaration of him that pays it.

(330. b.)

IT was ſaid, and not denied, that if a Man deviſeth a Sum of Money to ſuch charitable Uſes, as he ſhall direct by a Codicil to be annexed to his Will, or by a Note in Writing Charities.

 ting

ting; and afterwards leaves no Direction, neither by Note nor Codicil, the Court of Chancery hath Power to diſpoſe of it to ſuch charitable Uſes as the Court ſhall think fit: And ſo it was held in the Caſe of Mr. Sidrofen's Will,† and the Caſe of one Jones; but if the Will points at any particular Charity, as for Maintenance of a Schoolmaſter or poor Widows, then the Court of Chancery ought not to direct it to any other Purpoſe but ſuch as is pointed at by the Will; as if the Deviſe ſhould be for ſuch School as he ſhould appoint, and appoints none, the Court may apply it for what School they pleaſe, but for no other Purpoſe than a School, altho' it may be for what School the Court thinks fit.

See 1 Vern. Cha. Cas. 12.

† The case on this will is in 1 Vern. 224.

(331.)

Rudyerd *verſus* Nerne.

Lord Keeper. Baron and Feme. Portion. Ante Caſe 284. c. 310. Poſt Caſ. 353.

BY Articles of Marriage, in Conſideration of 1200l. paid and ſecured to be paid by the Woman, in Part of her Portion, and alſo in Conſideration of 1200l. more, which is due and payable to her out of the City of London, the intended Huſband covenants to ſettle certain Lands, and covenants that they are of the Value of 240l. per Ann. the Huſband dies, the 1200l. Orphanage-money ſtill continuing in the City of London: And the Queſtion was, Whether this 1200l. Orphanage-money ſhould go to the Wife, or to the Executor of the Huſband?

For the Executor of the Huſband it was urged, That theſe Articles import an Agreement that it ſhould be paid to the Huſband, inaſmuch as it appears, that the Jointure being juſt 240l. per Ann. was according to the uſual Courſe adequate to the 1200l. paid and ſecured to be paid, viz. 10l. per Ann. for every 100l. and the other 1200l. paid and ſecured, being mentioned to be Part of her Portion, implied that the other Part, viz. the Orphanage 1200l. was to be paid to the Huſband alſo.

Ante Caſe 30.

For the Wife it was argued, that being a Thoſe in Action, it did belong to her by Law; and altho' they admitted, that in Caſe there had been any expreſs Agreement, it would have belonged to the Huſband, altho' not recovered in his Life-time, yet that here was no expreſs Agreement for that Purpoſe: And of that Opinion was the Lord Keeper; and he ſaid, Altho' an Eſtate may ariſe by Implication in a Will, becauſe the Party is ſuppoſed to be inops conſilii, yet it will never ariſe by Implication in a Conveyance;

veyance; and what is said in this Deed imports no more than what the Law implied, viz. that she had such a Fortune in the Chamber of London, and if he recovered it out in his Life-time, it was his, but if not, it remained a Chose in Action, and would go to the Wife; and so dismis'd the Plaintiff's Bill, the Plaintiff being Executor of the Husband: But most of the Bar differed from my Lord in Opinion. Chose en Action.

Pawlett & ux' *versus* Lady Morley, Lord Herbert & al'. (332)

THE Lady Morley being Executrix to Sir Charles Morley, and the Plaintiff having married one of the Daughters, preferred his Bill for a Distribution; Sir Charles Morley having made his Will, and his Lady Executrix, gave 1000 l. a-piece to his Daughters, and some Jewels and other Things to his Lady: And one Question was, whether my Lady should have the whole Surplus as Executrix; for altho' it was agreed, that as the Law is now settled since the Case of Foster and Munt, that where a particular Legacy is given, and no Disposition of the Surplus, there shall be a Distribution, yet here it was insisted upon, that so near a Relation as the Wife being Executrix, it could not but be supposed the Testator intended her some Benefit by making her Executrix: But it was decreed, that she having a particular Legacy given, should distribute the Surplus; and so it was said it had been already settled, even in the Case of a Wife Executrix, in the Case of Randall versus Bookey. Lord Keeper. Executor to distribute. Ante Case 285.

But where an Executor is made, and no particular Legacy given, nor any Devise of the Surplus, then the Executor shall have the Surplus; and said it was held in the Case of Sir Jo. Packington and Sir Cyril Wyche.

And a Portion for the Plaintiff being to be raised out of the Rents, Issues and Profits, to be paid at Eighteen or Marriage, it was decreed that it should be raised by Mortgage; and so it shall be done in all Cases where the Rents and Profits will not raise it at the Time it becomes payable, and that even in the Life-time of the Father; as where an Estate is limited to the Father for Life, and after a Term to Trustees to raise Portions, if those Portions become payable, the Trustees may be decreed to raise it upon the reversionary Term, even in the Life-time of the Father. Portion.

Lord

(333.) Lord Peterborough *verſus* Lady Dutcheſs of Norfolk.

Lord Keeper. Evidence.

IT was agreed, that Depoſitions taken in a Cauſe, where Tenant for Life only was Party, could not be made Uſe of as Evidence againſt the Reverſioner or Remainder-man: And my Lord Keeper declared his Opinion, that Depoſitions taken in a Suit, where Tenant in Tail was Party, could not be made Uſe of againſt the Iſſue of Tenant in Tail, becauſe he comes in by a Title paramount per formam Doni; and altho' Tenant in Tail hath a Power over the Eſtate, and may diſpoſe of it, yet if he in a Bond binds himſelf and his Heirs, the Iſſue in Tail is not bound; but if Tenant in Fee is Party to a Suit, the Depoſitions taken in ſuch a Cauſe may be read againſt his Heir.

DE Term. Paſch. 1703.

In Curia Cancellariæ.

(334.) Griſe *verſus* Goodwin.

Lord Keeper.

A MAN by his Will deviſeth 500 l. to his Grandſon Jo. and 500 l. to his Grandſon Thomas, and charges his Lands with the Payment of thoſe Legacies, and then goes on, Item, I give to my Grandſon A. 500 l. and to my Grandſon B. 500 l. &c. And the Queſtion was, Whether

Whether the other Legacies ſhould be charged upon the Land as well as the Legacies of John and Thomas? And it was inſiſted by the Counſel that they ſhould, becauſe Item is as much as Alſo, and more then And, which only would have coupled the Gift of the Legacies; but Item implies more, and that they ſhould be raiſed in the ſame Manner; and here was the more Reaſon to put that Conſtruction upon it, becauſe the other Legatees were the Teſtator's Grandchildren, and therefore equally related with John and Thomas, and he ſeemed to have equal Kindneſs, having given them the like Sums.

But per Curiam, Theſe latter Legacies ſhall not be charged upon the Lands; for nothing is a more known Rule in Law, than that a Legacy of Money giveng enerally, is payable only out of the Perſonal Eſtate, and nothing appearing of the Teſtator's Intention to charge the Lands, the Word Item will not be ſufficient for that Purpoſe.

But decreed that, if the Perſonal Eſtate were not ſufficient to pay all the Legacies, John and Thomas ſhould have their whole Legacies out of the Real Eſtate, and ſhould not come upon the Perſonal Eſtate, to defeat the other Legatees, which was ſaid to be the common Caſe amongſt Creditors; where there are not Aſſets ſufficient, ſuch Creditors as have Real Securities ſhall have their Debts out of the Real Eſtate, or otherwiſe the Creditors by Simple Contract ſhall have the Benefit of their Securities pro tanto, to come upon the Real Eſtate.

Another Point was, A Term for Years was ſettled upon Marriage, by the Teſtator's Wife's Father, in Truſt for the Teſtator for Life, and after his Deceaſe, in Truſt for ſuch Perſon or Perſons as he ſhall nominate or appoint, and for Default of ſuch Nomination or Appointment, in Truſt for his Executors or Adminiſtrators. And the Teſtator deviſed the Eſtate; and the Queſtion was, Whether the Deviſee took it as Deviſee only, or by Virtue of the Execution of the Power by the Teſtator? For in the firſt Caſe it would be Aſſets, but in the laſt not. Power. Aſſets. Poſt Caſe 350.

And it was ſtrongly argued that this Term ſhould be Aſſets, and that it was in the Nature of a Legacy only to the Deviſee; and a Caſe was cited between Thompſon and Townley, where a Man ſold his Eſtate and left the Money in the Hands of the Purchaſor, to be paid to ſuch Perſon or Perſons as he ſhould by his Will direct and appoint,

and by his Will he deviſed it away; and the Queſtion was, Whether this Money ſhould be Aſſets or not? And decreed that it ſhould, and that Decree affirmed in the Houſe of Lords.

The Lord Keeper agreed that Caſe, and ſaid it was a Lincolnſhire Caſe, but differed this Caſe from it, becauſe there the Purchaſe Money was, upon the Sale of his Eſtate, once his own Money; and a Man ſhall not, by ſettleing his own Money in that Manner, defeat his Creditors, by making it no Aſſets; but here this Term was never in the Teſtator, but ſettled upon him by his Wife's Father, with a Power to diſpoſe, and he having deviſed it, it is an Execution of his Power, altho' it be deviſed without any Reference to his Power, and therefore he was of Opinion it ſhould not be taken as any Part of his Aſſets; and decreed accordingly.

DE

Term. S. Mich.

1703.

In Curia Cancellariæ.

(335.) Bamfield *verſus* Popham.

Lord Keeper, Two Chief Juſtices and J. Powell.

Deviſe. Eſtate Tail or for Life.

Poſt Caſe 338.

UPON a Motion for an Injunction to ſtay Waſte, a Queſtion aroſe, Whether Mr. Popham was Tenant for Life or in Tail upon this Caſe?

The Eſtate in Queſtion was deviſed to Truſtees, in Truſt for Mr. Popham for Life, with Remainder

to his first and other Sons in Tail Male successively; provided that if Mr. Popham should die without Heirs Male of his Body before 21, then to go to Mr. Bamfield, &c. Afterwards he makes a Codicil, whereby he declares his Mind to make some Alteration in his Will, and thereby declares that if the Estate Tail given to Mr. Popham by his Will, should determine before 21, that then Sir F. Popham, the Father of Mr. Popham, should have it for his Life.

The Testator being Dead, and Mr. Popham having no Issue Male felled Timber, and Bamfield being the Remainder Man, preferred his Bill to have an Injunction to stay Waste.

1st, It was argued pro Quer', That Mr. Popham had but an Estate for Life, for it was so expressly devised to him with Remainders to his first and other Sons, &c. and that the Words in the Proviso and Codicil should not carry it farther, to make him Tenant in Tail; and that it would be to no purpose to make such an Exposition, because the Devise to his first and other Sons in Tail Male, would continue as long as he had any Issue Male. And Dyer 171, Storch versus Frensham, was relied upon as to this Point, that an express Estate devised, should not be enlarged by the Implication of subsequent Words; and cited likewise 3 Cro. 313, Clerke versus Day. More 593. Ow. 148.

On the other Side it was said, that an express Estate devised may be enlarged by the Implication of subsequent Words, as where an Estate is devised to A. for Life, provided that if he die without Issue, it shall go to B. though by the first Words, it be but an Estate for Life, the latter make it an Estate Tail. Besides it was said that there was a very material Difference between the Estate to Mr. Popham for Life, with Remainder to his first and other Sons in Tail Male, and a Devise to him and the Heirs Male of his Body, as to the Persons who were to take. 1 Vent. 230. Mo. 682. 1 Bulst. 22.

For in the first Case, if Mr. Popham had died, his Wife being enseint of a Son, who was afterwards born; this posthumous Son could never take, because it was a contingent Remainder, and defeated by the Determination of the particular Estate, before the Son was in esse; but in the latter Case where the Devise is to him and the Heirs Male of his Body, the posthumous Son shall take.

And altho' a Will in Writing ought not to be expounded by Matter dehors, yet one Part of it ought to be explained by another, and the Intent of the Testator ought to be collected out of the whole Will and Codicil; and since the Testator himself had called it an Estate Tail in the Codicil,

dicil, he had by that declared his Intention that it should be so. The Authorities cited for the Defendant were 2 Cro. 448. 1 Foll. 836, 839. 9 Co. Sanday's Case.

The Court took Time to the next Term to consider of it.

(336.)

Attorney General *versus* Bamfield.

Lord Keeper. Devise to the Posterity of A.

ONE Question was, a Devise of Goods was made to A. for Life, and after his Decease to the Posterity of Thomas Bamfield; and the Question was, Whether by Virtue of the Word Posterity, only Descendants from the Body of T. B. should take, viz. Children and Grandchildren, or whether he having no Issue, it should go to collateral Relations? The Lord Keeper was of Opinion, that it went only to the Issue of the Body, and that if a Devise were to A. and his Posterity, it would be only an Estate Tail. But the Master of the Rolls thought that a Devise to a Man and his Posterity would create a Fee; whereupon the Lord Keeper ordered them to search if they could find any Precedents.

(337.)

Floyd *versus* Buckland.

Master of the Rolls.

Statute of Frauds and Perjuries.

THE Plaintiff having a House in Monmouth-street, agreed with the Defendant for a Piece of Ground adjoining, to take a Lease of him for as long Time as he had in the House; and thereupon the Plaintiff entered upon the Ground and built a Wall, and made a Vault, &c. for Conveniency of his House, and when he had so done, the Defendant refused to make him a Lease; whereupon the Plaintiff preferred his Bill to have an Execution of the Agreement, that the Defendant might make him a Lease.

The Defendant pleaded the Statute of Frauds and Perjuries, the Agreement being only by Parol, and no Agreement in Writing; his Plea was over-ruled by the Lord Keeper, and the Cause coming now to Hearing before the Master of the Rolls, he decreed the Defendant to perform the Agreement and to pay Costs; and said the Statute was not made to encourage Frauds and Cheats; and the Plaintiff having laid out his Money in Pursuance of the Agreement and taken Possession of the Land, the De-

fendant ought to execute a Lease for as long Time as the Plaintiff had in his House. And the Case of one Butcher was cited, where a Parol Agreement was decreed, Possession being delivered in Pursuance of it; and likewise a Case decreed by the Lord Nottingham, where a Deed was sealed for Security of Money borrowed, and the Deed being absolute, the Defendant promised to seal a Defeazance, and afterwards refusing, a Bill was preferred to compel him, and though he insisted upon the Statute of Frauds and Perjuries, he was decreed to seal a Defeazance, tho' there was no Agreement in Writing for that Purpose. Post Case 352.

Popham *versus* Bamfield. (338.)

THEY all delivered their Opinions seriatim, that it was but an Estate for Life, and the Reason they went upon was, because it is expressly devised for Life, and being so shall never be enlarged by Implication, although by express Words it might; as where an Estate is devised to A. for Life, the Remainder to the Heirs of his Body, this is an Estate-Tail by express Words. And here did not appear any Intent of the Testator, to make it an Estate-Tail; for the Words, If he died without Heir Male of his Body, are applicable to what went before, that is to say, such Heirs Male as he had limited it to before; for none could take as first or second Son, but such as was Heir Male at the Time he was to take; so that in common Parlance it was an Intail, and was so called, and the Words were true in a relative Sense, but not in an absolute Sense. Lord Keeper, Ch. J. Holt, Master of the Rolls. C. J. Trever, J. Powell. Ante Case 335. 3 Lev. 434. Raym. 28.

And as for what was alledged, that a Posthumous Son would by this Means be defeated; admitting that to be so, the Inconvenience would be greater the other way; for if it were construed to be an Estate-Tail, it would be in the Power of the first Son, when he comes into Possession, to bar all the Remainders by a Recovery.

And though it be called an Estate-Tail in the Codicil, that will not make it so in Case it were not so before, for a false Recital will never alter an Estate from what it was before. 2 Vent. 57.

And the Lord Keeper and Master of the Rolls were of Opinion, That the Posthumous Son could not be defeated in this Case, because the legal Estate in the Trustees would support it.

And as to Sunday's Case 9 Co. where it was said an Estate-Tail was created by Implication there was no express Estate limited for Life, but limited generally, which though of it self it would have carried only an Estate for Life, yet it was capable of being inlarged by Implication.

2 Jones 114. And Holt said, the Case of Lisle and Grey, which is said in 2 Jones 114 to be reversed in the Exchequer Chamber, was not reversed, but affirmed; and so it appeared upon the Roll, which he had caused to be searched.

The Lord Keeper said, where an Estate was created by Implication, it must be a necessary Implication, as a Devise to the Heir after the Death of the Wife, the Wife takes an Estate for Life by Implication of Necessity, because it is plain his Intent was, that the Heir should not have it till after her Death.

They all agreed that Alexander Popham had only an Estate for Life, and not an Estate-Tail.

(339.) Lord Keeper. Trust to pay Debts and Legacies. Ante Case 321. 3 Rep. C. 248.

IT was cited by Dobbins as a Case now settled, upon Consideration had of all the former Cases by this Lord Keeper, in a Cause between Herbert and Herbert, that where Lands were devised for Payment of Debts and Legacies, that the Debts being such as had no Lien upon the Land, as Debts by Simple Contract, &c. the Debts should have no Preference; but if there be not sufficient to pay all, they shall be paid in Proportion, although it was otherwise held in the Lord Nottingham's Time, who used always to say, that a Man ought to be Just before he was Bountiful; and so the Course of Equity seems since that Time to be so settled.

DE
Term. S. Hill.
1703.
In Curia Cancellariæ.

Gerard *verſus* Gerard. (340.)

SIR Ch. Gerard of Harrow, upon his Marriage with the Duke of Somerſet's Siſter, and Four thouſand Pounds Portion, ſettles an Eſtate to the Uſe of himſelf for Life, and then to his Lady for Life, and ſo to his firſt and other Sons in Tail; and if he ſhould have no Iſſue Male living at the Time of his Deceaſe, then to the Uſe of Truſtees for Five hundred Years, upon Truſt to raiſe Five thouſand Pounds for ſuch Iſſue Female, if but one, at her Age of Twenty-one Years or Day of Marriage, which ſhould firſt happen after the Deceaſe of Sir Charles and his Lady; ſo as that if ſuch Marriage was had in the Life-time of her Parents or Grandparents, the ſame ſhould be had with the Conſent of the Parents or Grandparents. Lord Keeper. Portion when due.

Sir Ch. Gerard died, and the Daughter arrived at the Age of Twenty-one Years in his Life-time, and my Lady, the Mother, is ſtill living; and the Daughter preferred her Bill for to have her Portion raiſed.

It was objected by the Defendant's Counſel, That this ought not to be raiſed till after the Deceaſe of my Lady, becauſe this Term did not take Effect in Poſſeſſion till after her Death, and it is appointed to be raiſed out of the Rents and Profits, &c. and if it might be raiſed in the Life-time of the

the Mother, it might so have been in the Life-time of the Father, which would be very unreasonable.

But to that it was answered, and held by the Court, That in this Case it could not be pretended to be raised in the Life-time of the Father, because the Term, which was the Fund to raise it, rested in Contingency till after the Death of the Father, because the Term was to vest upon his dying without Issue Male, and his leaving Issue Female; but where a Term did vest, tho' it was in Reversion after the Decease of the Father, yet when the Money was made payable at a certain Time, as at the Age of Twenty-one or Marriage, there it had been decreed to be raised even in the Life-time of the Father; and so it was in the Case of my Lord Tracy: And a Case of Heliard and Jones was cited, where it was so resolved in an Appeal to the House of Lords. And altho' the first Clause for Payment of the Portion, had it stood single, had been pretty plain that it could not have been paid till after the Decease of the Father and Mother, yet by the subsequent Words it seems to be intended, that it should have been paid in their Life-time, upon Marriage, in case such Marriage was had with Consent: And so the Intent appearing upon the whole Deed, and being for a Portion, it was ordered to be raised by Sale, in case Sir Ch. Gerard did not pay it.

Anonymus.

(341.)

Personal Estate in Aid of a Legatee. Post Cas. 347.

A MAN having pawned a Jewel for a Sum of Money, devised the Jewel to B. and made C. his Executor, and gave him all his Goods, Chattels and personal Estate, after his Debts and Legacies paid: And the Question was, Whether B. should pay the Debt for which the Jewel was pawned, or whether it should be paid out of the personal Estate by the Executor? And decreed that it should be paid out of the personal Estate, and that the Legatee should have the Jewel discharged of it. This Decree was afterwards affirmed in the House of Lords, come dict' fuit per Crawford, who was of Counsel in it, a Scotch Cause.

DE
Term. Paſch.
1704.

In Curia Cancellariæ.

Dimock's *Caſe*. (342.)

Lord Keeper. Advowſon mortgaged.

A Manor, to which an Advowſon was Appendant, was ſettled to Sir H. Hobart for Life, Remainder to his Lady for Life, Remainder to their firſt Son, with divers Remainders over; afterwards there was a Term for One Thouſand Years, created of the Manor by Act of Parliament, which was veſted in Serjeant Rawlinſon, by way of Mortgage, for ſecuring 2300 l. which Term was by the Act precedent to take Place before my Lady's Eſtate.

Sir H. Hob. dying, his Lady became intitled unto the Manor, and ſold the next Preſentation to Mr. Dimock (who took the Grant in the Name of Serjeant Selby and Mr. Kendall) for 100 l. which was paid to my Lady; and Serjeant Rawlinſon joined with my Lady in the Grant, becauſe the Eſtate in Law was in him by Virtue of the Act of Parliament: In the Grant there was a Proviſo, that if my Lady died before the Church became void, ſo that the Grantee could have no Fruit of the Grant, that the 100 l. was to be paid back again.

My Lady being dead, the Church became void, and the Son of Sir H. Hobart prefers his Bill to have the Preſentation, and his Clerk admitted.

And decreed, that the Grantees ſhould preſent his Clerk, becauſe a Mortgagee is but a Truſtee for the Mortgagor when his Money is paid; and ſo he is for the Overplus of the mortgaged Eſtate more than his Money; and an Advowſon being a Thing that yields no Profit when the Church is void, it was decreed, in the Caſe of Colonel Jory and Mr. Cocks, that the Mortgagor ſhall have the Nomination of the Clerk, if the Church become void, and the Mortgagee ſhall preſent him, becauſe if the Mortgagee ſhould preſent, he can make no Profit of it, and ſo it will not ſink the Debt, nor can he account for it; and that is the Reaſon that a Guardian ſhall not preſent, but the Infant himſelf ſhall.

(343.)

Simons *verſus* Simons.

Lord Keeper.

Debts in what Order to be paid.

IN a Cauſe depending in Chancery concerning the Payment of Sir William Baſſett's Debts, there being ſeveral Debts due by Mortgages and Judgments, and not being ſufficient to pay all, the Queſtion was whether the Mortgages ſhould be preferred before the Judgments? And the Cauſe being heard before the Maſter of the Rolls, he decreed the Payment of the Mortgages before the Judgments; and the Decree was ſigned and inrolled: Whereupon there was afterwards an Appeal to the Houſe of Lords; and they reverſed the Decree, and ordered that they ſhould be paid promiſcuouſly, according to their Priority: And ſo it is now held.

Note; This Caſe I had Ex relatione Mr. Swinborne.

N. B. This Queſtion muſt be intended of puiſne Mortgages and Judgments; for as to the firſt Mortgage and Judgment, it never was a Queſtion but that the firſt will take Place, becauſe the firſt hath a legal Right, and ſtands in no Need of the Aid of a Court of Equity.

DE
Term. S. Mich.
1704.
In Curia Cancellariæ.

(344.)

A BILL was preferred against a Purchaser, for Discovery of a Trust, and charged that the Trust appeared in his Purchase Deeds. The Defendant by his Answer denied any Notice of the Trust, and also denied that there was any Mention of it in any of his Purchase Deeds. The Plaintiff replied to his Answer, and the Cause being at Hearing, the Question was, Whether the Defendant should be compelled to produce his Purchase Deeds? It was insisted for the Plaintiff, that he having replied to the Answer, it could not now be taken for true, but he ought to prove the Truth of it as in other Cases, which in this Case could be no otherwise than by producing the Deeds. On the Defendant's Part it was insisted, that if this should once be admitted, it would be an Artifice to compel all Purchasers to shew their Deeds, and thereby to expose their Titles. The Lord Keeper was positive, That he would never compel a Purchaser to expose his Title in this Court; and that the Court had always taken Care to protect them, where they swear themselves Purchasers without Notice of a Trust or Incumbrance. The Master of the Rolls seemed to doubt, and said it was a Case of great Moment either Way; for as on the one Hand a Purchaser may be exposed, so on the other Hand, altho' a Purchaser hath Notice of a Trust or an Incumbrance in his Deeds, yet if he will swear boldly, there is no Way to come at it. It was proposed for a middle Way, that the Defendant might produce his Deeds, so as to be looked into by the Court, or by a Master: But the Lord Keeper would not order it.

Lord Keeper. Purchaser not to produce his Deeds.

In

Notice. In this Case it was said by the Master of the Rolls, that Notice to the Attorney, Solicitor, or Agent, if proved, is good Notice to the Parties.

(345.) Cooke *versus* Walter.

Lord Keeper. Executor to distribute. THE Question upon the Will of Mrs. Penelope Lace was, She made her Will, and the Defendant her Executor, and gave him 20 l. to buy him Mourning; and the Question was, Whether this was such a Devise to him as should exclude him from the Residue of the personal Estate, so that it should go by Way of Distribution to the next of Kin; the Plaintiff's Bill being for Distribution.

It was admitted in this Case, if no Part of the personal Estate be devised to the Executor, altho' there be no Devise of the Residuum, he shall have it: And Sir Sebastian Smith's Case was cited for the Defendant, where a Man had made his Will, and devised all his Books except Twelve, which his Executor should choose: And it was adjudged that should not bar the Executor of the Residuum, but it was not an express Gift, but an Exception out of what he had given, which would by Consequence have fallen into the personal Estate.

And in this Case it was alledged, That this was not a Bequest of any Thing to the Executor of any more than what was to be spent upon Mourning, and so ought not to exclude him, it being no Profit to him, but to pay Respect to the deceased.

But decreed, that this was a Bar to the Executor, for that it is a Gift to him of that Sum, and he may lay out what he pleaseth of it in Mourning; and decreed that he must account for it to the next of Kin.

(346.) Bishop *versus* Sharp.

Lord Keeper. Personal Estate in Aid of the Real. A. Devises all his personal Estate to B. and deviseth an Estate in Fee, which was mortgaged for 300 l. to C. And the Question was, Whether this Debt upon the real Estate should be paid and discharged out of the personal, or whether it must go to the Devisee cum onere?

It was agreed in this Case,

1st, That Hæres factus, as well as Hæres natus, shall have the Aid of the personal Estate in Ease of the real.

2dly, That a ſpecifick Legacy ſhall never be taken away, to be applied in Aid of the real Eſtate.

3dly, That where any Debts or Legacies are to be left unpaid, then the perſonal Eſtate ſhall never be taken away, to be applied in Eaſe of the real Eſtate: But in this Caſe it was inſiſted, that here being a Deviſe of all the perſonal Eſtate, the Deviſee ſhould be in the ſame Caſe with an Executor or Adminiſtrator. Ante Caſe 266, 278. b. 282.

But the Lord Keeper decreed, that the perſonal Eſtate ſhould not be applied in this Caſe, for ſince the Teſtator had deviſed it to him, he ſaw no Equity to take it away, and apply it in Eaſe of the Deviſee of the real Eſtate.

But ſome others ſeemed to be of a contrary Opinion, becauſe in every Mortgage there is a Covenant for Payment of the Money, which makes it a Debt, and recoverable out of the perſonal Eſtate, and took a Diſtinction between a Mortgage with ſuch a Covenant, and a Pawn for a Debt where there is no Covenant to pay Money.

DE

Term. S. Hill.

1704.

In Curia Cancellariæ.

Hawes *verſus* Warner. (347.)

A. Having mortgaged the Manor of S. deviſeth the ſaid Manor to B. and afterwards deviſeth all his Goods, Chattels, and perſonal Eſtate to C. his Debts and Legacies being firſt paid thereout: And the Queſtion was, Whether B. ſhould take the mortgaged Lord Keeper. Perſonal Eſtate in Aid of the Real. Ante Caſe 341, 346.

gaged Lands, or whether the Mortgage should be discharged out of the personal Estate? And the Lord Keeper took Time to consider of it, this differing from Bishop's Case next before, by Reason of these Words, My Debts and Legacies being first paid thereout. The Lord Keeper took two or three Days Time to consider of it, and gave his Opinion, That the personal Estate ought to be applied to pay off the Debt upon Mortgage; and his Legacies and Debts being first paid, should extend to Debts upon Mortgage; and decreed accordingly.

(348.)

Anonymus.

Lord Keeper.

Trust, and not a Condition.

LAND was devised to the Heir at Law, paying a Sum of Money to B. It was held in this Case, that paying did not make a Condition, because no one could enter for the Condition broken but the Devisee himself; but this would be a Trust upon the Land for raising the Money, and if a Purchaser had Notice of the Will, he should be affected with it; but as this Case is, if the Heir should sell to a Purchaser without Notice of the Will, (as he might make a Title without the Will, being Heir at Law) the Money might be lost; and therefore the Money being not payable until some Years hence, the Heir was decreed to give Security, by mortgaging the Estate. And in this Case it was said, that where there is an Agreement between Parties upon a Security, that this Court will never cause the Party to give further Security; but where there is a Trust for raising Money, and the Estate is like to be wasted, this Court will inforce the giving of Security, so that the Trust may not be defeated: And the Lord Keeper said he had known the Spiritual Court refuse Administration to the next of Kin, where it appeared to them that he was a Spendthrift, and like to waste the Estate: And in this Case it was said, that in Case the Devise were to a Stranger paying 100 l. to A. that this makes a Condition, and that the Heir may enter for the Breach of it; but when he hath entered, he shall be a Trustee, so far as to secure the 100 l.

Security decreed to be given.

Trust.

(349.)

Master of the Rolls.

Injunction to stay Waste.

A Woman Tenant in Tail, after Possibility of Issue extinct, was restrained from committing Waste in pulling down Houses, or in cutting down Trees, which stood in Defence of the House, and Fruit-trees in the Garden; but

nte Case 61.

for ſome Turrets of Trees, which ſtood a Land's Length or two from the Court, would grant no Injunction, becauſe ſhe had by Law Power to commit Waſte; and yet notwithſtanding, ſhe was reſtrained in the Particulars aforeſaid, becauſe that ſeems to be malicious.

The Lord Cornwallis's *Caſe*. (350.)

1. l. 2. Vern. 465. Prec. in Chanc. 232. ſee 1. Atk. 465. 2. Ver. 1.

THE Lord Cornwallis, upon his Marriage with Sir Stephen Fox's Daughter, veſted a Term in Truſtees upon Truſt to raiſe 3000 l. for younger Children, and 3000 l. more for ſuch Uſes and Purpoſes as he ſhould appoint: He appoints 3000 l. to be raiſed for his Daughter, and the other 3000 l. he appointed to be raiſed, and by his Will gave the laſt 3000 l. to his Daughter alſo, and died.

Lord Keeper. Aſſets, Power to raiſe Money. Ante Caſe 334.

The Creditors preferred a Bill to have the laſt 3000 l. applied as Aſſets towards Payment of their Debts, which was the only Queſtion in the Caſe.

And in this Caſe it was decreed, That the laſt 3000 l. ſhould be Aſſets; for he having appointed it to be raiſed, it was in the Nature of his perſonal Eſtate, and the Debts ſhould take Place before the Legacy given to his Daughter.

But in this Caſe it was held, That if a Man who hath Power to raiſe Money dies in Debt, having made no Appointment for raiſing it, the Creditors cannot make this Aſſets, and raiſe the Money purſuant to the Power; but in the Caſe in Queſtion, the Money was appointed to be raiſed, which made the Difference.

ſee 2. Atk. 172.

Bright *verſus* Smith. (351.)

BY the Cuſtom of London, if a Freeman hath advanced a Child in his Life-time, and it appears by his Will, or by any Writing what the Sum advanced is, and that the Sum advanced is leſs than the cuſtomary Share doth amount unto, ſuch Child ſo advanced may come in for a cuſtomary Share, bringing the Sum ſo advanced in Hotch-pot: But if it doth not appear what the Advancement is, then the Advancement is a Bar of the cuſtomary Share.

Maſter of the Rolls at Powis-houſe. Cuſtom of London as to Orphans.

The Caſe here was, that the Father of the Plaintiff and Defendant in his Will takes Notice that he had advanced the Plaintiff in his Life-time, by giving her 300 l. and upwards,

Ante Caſe 63.

wards, and thereupon gives her five Shillings only by his Will: And the Queſtion was, Whether this ſhall be taken to be ſuch a certain Sum appearing in Writing, that ſhe may put it in Hotchpot, and come in for her cuſtomary Share, by Reaſon of the Word Upwards, which, as it was ſaid, made it very uncertain; but decreed that this was a certain Sum appearing in Writing, and he would take it to be 300 l. only: And altho' it was ſaid, that by the Word Upwards it might be taken to be 500 l. or 1000 l. the Maſter of the Rolls ſaid it could not be ſo intended here, but that it might be intended a little more, and ſo little, that the Teſtator did not well know, and de minimis non curat Lex. Note; it was ſuppoſed that the Word Upwards was inſerted purpoſely to make it uncertain, which made it look like a Trick; but if he had taken Notice that he had advanced his Daughter, and not ſaid what, ſhe had been barred; but here it was decreed, that ſhe ſhould come in for her Share, bringing the 300 l. in Hotchpot.

DE Term. Paſch. 1705.

In Curia Cancellariæ.

(352.) Skett *verſus* Whitmore.

Lord Keeper.

Statute of Frauds and Perjuries.

THE Plaintiff and other Creditors of William Whitmore deceaſed, prefer a Bill againſt the Defendant Jo. Whitmore for a Diſcovery of Aſſets: And the only Queſtion was, Whether a Term which was aſſigned

assigned to Jo. Whitmore, was in Trust for William? The Case was,

Sir Samuel Clarke being seised in Fee of the Reversion of the Lands in Question, expectant upon the Death of Margaret Mumpford who was Tenant for Life, made a Lease for 500 Years by way of Mortgage, to commence upon the Death of Margaret Mumpford; afterwards William Whitmore agrees with Sir Samuel Clarke for the Purchase of the Reversion, and the Term was assigned to the Defendant, William Whitmore, 16 May, and the Fee was conveyed to William Whitmore 17 May: In the Conveyance of the Fee the Consideration is mentioned to be paid by John and William, but there was a Concurrence of many other Circumstances, whereby it plainly appeared that John Whitmore was only a Trustee for William, and that the Term was intended to attend the Inheritance, but no Declaration of Trust in Writing; and the Defendant having denied the Trust by his Answer, the Question was, Whether any Decree could be made by Reason of the Statute? And it was said for the Plaintiff that this Court had in several Cases, where there was no Writing, caused the Execution of an Agreement; as where an Agreement was in Part executed, as where a Tenant had taken a Lease, but no Writing signed, and Possession had been delivered, and the Tenant had laid out his Money in Stock, or where he had laid out Money in Building, the Court hath compelled the making of the Lease; and so in the Lord Nottingham's Time, where the Purchase Money was paid, and the Deeds refused to be sealed, he decreed the Sealing of them; and so if a Mortgagee refuse to seal a Defeazance, he hath been decreed to do it.

Ante Case 337.

Post Cas. 356.

The Reason in the two first Cases is, because the Agreement was in Part executed, and in the two last Cases there was apparent Fraud; but in this Case, tho' the Lord Keeper declared he was fully satisfied that it was intended a Trust, yet there being no Writing to declare it, he was not satisfied to do it in Opposition to the very Letter of the Statute, unless they could shew him some Precedents, and so took Time to consider.

Norbone's Caſe.

(353.)

Lord Keeper, Maſter of the Rolls.

Baron and Feme.

Choſe in Action.

Ante Caſe 78, 284. c. 310, 331.

THE Lord Viſcount Hereford, upon his Marriage with the Lady Bacons's Grandaughter, agreed to ſettle 300 l. per Ann. in Suffolk, and a Rent-Charge of 500 l. per Ann. iſſuing out of Lands in Worceſterſhire for a Jointure. Upon the Treaty, her Fortune was propoſed to amount to 19000 l. which conſiſted of ſeveral Particulars, and one whereof was 1350 l. which was in my Lady Bacons's Hands, and was by her put out upon a Mortgage; ſome Items of the Portion being ſuppoſed to be bad Debts, the real Portion was eſtimated at 16000 l.

The Lord Hereford dying, the Queſtion was, Whether this 1350 l. being a Choſe in Action, ſhould ſurvive to the Wife, or go to the Executor of the Husband?

And the Court was of Opinion that it ſhould go to the Executor of the Husband, by Reaſon it was under Conſideration, as Part of the Marriage-Portion for which the Jointure was made, and the Jointure was adequate to the Portion; and it would be unreaſonable that the Wife ſhould have the Jointure and her Portion too. It was admitted that where no Agreement is made upon Marriage, all the Choſes in Action ſurvive to the Wife, notwithſtanding that ſhe hath the Dower; but here the Agreement imported that the Husband was to have the Portion.

And it was ſaid this Caſe was the ſtronger, becauſe it may be a Queſtion whether this were a Choſe in Action, for being once Money in the Grandmother's Hands, the Maſter of the Rolls was of Opinion that it was not in the Power of the Grandmother, who was Guardian, to turn it into a Choſe in Action, no more than a Guardian or Truſtee can turn Money into Land, ſo as to make it go to the Heir inſtead of the Executor.

Qu. How to reconcile this Caſe to the Caſe of Rudyerd and Nerne, ante Caſe 331. which Caſe was cited; but the Lord Keeper took no Notice of it when he gave Judgment.

Fel-

Fellows *verſus* Owen, Mitchell & ux' and his Children, *Defendants.* (354)

Lord Keeper, Maſter of the Rolls.

Two Truſtees join in a Receipt, each anſwerable for the Whole. Poſt Caſe 356.

UPON the Marriage of the Defendant, Mr. Mitchell in Conſideration of 1800 l. Portion, Mr. Mitchell aſſigned a Mortgage to the Plaintiff Fellows and the Defendant Owen, upon Truſt that 2000 l. ſhould be paid to the Plaintiff and Defendant Owen, to be put out at Intereſt, or laid out in the Purchaſe of Lands, by the Approbation of the Defendant Mitchell, upon Truſt that the Defendant Mitchell the Huſband ſhould have the Intereſt and Rents during his Life, and after his Deceaſe, in caſe his Wife ſhould ſurvive him, that ſhe ſhould have the Diſpoſition of the ſaid Money or Lands as ſhe ſhould think fit; and if ſhe made no Diſpoſition, then to the Uſe of all their Children equally; and if there ſhould be no Diſpoſition, nor any Children, then to go to the Executors or Adminiſtrator of the Huſband.

The 2000 l. was paid to the Plaintiff and Defendant Owen, in Purſuance of the Marriage Agreement, and they joined in a Receipt for the Money; but the Plaintiff received 1000 l. of it, and the Defendant Owen the other 1000 l. and Mitchell the Huſband was preſent when the Money was ſo paid; Owen proving inſolvent, Mr. Fellows preferred his Bill, that paying the 1000 l. which he received he might be diſcharged of the Truſt; and the only Queſtion was, Whether the Plaintiff having joined in the Receipt for the whole 2000 l. ſhould not be anſwerable as well for the 1000 l. which was paid to the Defendant Owen, as for that which was paid to himſelf?

It was inſiſted that the Money being paid to the Defendant Owen, in the Preſence of the Defendant Mitchell, the Huſband, it was an Evidence of his Conſent, he not oppoſing it.

But to that it was anſwered, that he had denied in his Anſwer, that he ever conſented, and beſides, if he did conſent, that only could affect his own Intereſt, but ſhould not prejudice his Wife or Children.

In the principal Point, the Lord Keeper and Maſter of the Rolls ſeemed to be both of Opinion, that the Plaintiff having joined in the Receipt he was anſwerable for the Whole, altho' the 1000 l. received by Owen was never in his Hands; and I cited a Caſe of one Pytts, before the Maſter

of

of the Rolls in Michaelmas Term laſt, where the ſame Point was in Queſtion upon a Special Report, and after he had taken Time to conſider of it, and gave Judgment that the two Executors joining in the Receipt, each of them were anſwerable for the Whole; but the Counſel for the Plaintiff inſiſting that there had been Precedents on the other Side, the Lord Keeper gave them Time to produce them, and ſo adjourned the Cauſe, but ordered to continue in the Paper.

(355.)

Lambe *verſus* Parker.

Lord Keeper. Revocation of a Will.

MRS. Parker deviſed the Eſtate in Queſtion for three Lives, and afterwards made a Leaſe of the ſame Eſtate for three other Lives; and the Queſtion was, Whether this Leaſe was a Revocation of the Will?

And the Lord Keeper ſeemed to be of Opinion that it was not a Revocation, becauſe the three Lives in the Leaſe might die before the Teſtator, and then the Deviſe ſhould take Place, but was not poſitive, but referred it to the Judges of the King's Bench, by Way of a Caſe, to determine.

It was agreed that where a Man deviſeth the Fee, and after mortgageth in Fee, that this would not be a Revocation, becauſe there was an Equity of Redemption ſubſiſting, which may be operated upon by the Will; but in this Caſe there is nothing but a mere Poſſibility, for the Lives in the Will may die before the three Lives in the Leaſe. Et adjournatur, and referred it to the Judges of the King's Bench.

(356.)

Oldham *verſus* Litchford.

1. l. 2. Vern. 506.

Lord Keeper. Statute of Frauds.

THE Plaintiff's Bill was for an Annuity of 40 l. per Ann. which was given him by Litchford, the Defendant's Brother and Teſtator; the Caſe was, that the Teſtator was making his Will, and amongſt other Things, was directing this Gift to the Plaintiff to be inſerted in his Will, and the Defendant being preſent, deſired him not to put it in his Will, but ſaid as he was a Chriſtian he would take Care to ſee it paid; and thereupon it was omitted in the Will. And the Plaintiff having preferred his Bill for it, it came to Hearing before the Maſtre

ſter of the Rolls, and he decreed the Payment of it, and that it ſhould be charged upon the Real Eſtate; and now upon Appeal it came before the Lord Keeper, and it was inſiſted for the Defendant, that there being a Will in Writing, ſince the Statute of Frauds, &c. nothing could be Part of the Will but what was in Writing, and that no Executor or Adminiſtrator ſhould be charged upon any Promiſe unleſs it were in Writing, and that if it had been in the Will it would have charged the Defendant no farther than he had Aſſets, and therefore it ought to have been decreed out of the Aſſets only, and that there was no Colour to charge it upon the Land.

But the Lord Keeper was of Opinion, and decreed that the Defendant ſhould pay it, and the Ground he went upon was, that this was a Fraud upon the Teſtator and the Legatee; and that, notwithſtanding the Statute of Frauds and Perjuries, this Court had relieved in Caſe of a Fraud, altho' there was nothing in Writing to charge the Party; as in the Caſe where a Mortgage Deed was ſealed, and the Mortgagee refuſed to ſeal the Defeazance; and he cited the Caſe of Dutton and Pool, immediately after the Statute, where Sir H. Pool was making his Will, and intended to raiſe Portions for his younger Children by felling of Timber; but his eldeſt Son being by deſired him not to cut down the Timber, becauſe it would deface the Eſtate, and he would anſwer the Value of it to his Brothers and Siſters, and thereupon he forbore to cut the Timber, and died; and he refuſing to make good his Promiſe, Sir R. Dutton, who married one of the Daughters, brought his Action upon the Promiſe, and recovered; but he ſaid he could not decree it a Charge upon the Land; but the Maſter of the Rolls being in Court, ſaid the Reaſon he went upon to charge the Land was, becauſe the Maintenance of a Poor Scholar was a Charity, and was within the Statute of 43 Eliz. of Charitable Uſes, and it might amount to an Appointment within that Statute.

Ante Caſe 352. 1. C. 1. Vent. 318. 332. 1. Raym. 302. 1. Jo. 102. 2. Lev. 210. 3. Keb. 706. 814. 830. 836.

(357.) Fellows *verſus* Owen and Mitchell, and his Wife and Children.

Lord Keeper.

Truſtees give a joint Receipt, and one proves inſolvent.
Ante Caſe 354.

THE Defendant Mitchel married the Plaintiff's Siſter, and by the Marriage Agreement 2000 l. was to be depoſited in the Hands of the Defendant Owen and the Plaintiff Fellows, to be laid out in a Purchaſe, and in the mean Time to be placed out at Intereſt, in Truſt for the Defendant Mitchel and his Wife and Children: According to the Purport of the ſaid Agreement, the 2000 l. was paid, and the Plaintiff Fellows and the Defendant Owen joined in a Receipt for the whole 2000 l. but the Plaintiff received 1000 l. and the Defendant Owen the other 1000 l. and now the Defendant Owen being become inſolvent, the Plaintiff preferr'd his Bill, that upon Payment of the 1000 l. only, which he received, he might be diſcharged of the Truſt.

It was inſiſted for the Defendant Mitchel, That the Plaintiff having joined in the Receipt for the whole 2000 l. altho' he actually received but 1000 l. yet he ought to be anſwerable for the whole. And this was the only Point in Queſtion: And a Caſe was cited between Murrell and Pitt, where upon a Reference to the Maſter to ſtate the Caſe, it appeared to be, that two Executors having acted jointly in the transferring of East India Stock, that each of them ought to be anſwerable for the whole; and was ſo decreed by the Maſter of the Rolls, Feb. 5. 1704.

The Lord Keeper took Time to conſider of it, and deſired to be attended with Precedents; but thought it a very hard Caſe that a Truſtee ſhould be anſwerable for more than he received, altho' he joined in the Receipt: And it was ſaid, that there were Precedents where it had been held that he ſhould not. Cur' adviſ. vult.

13 November 1705.

This Cauſe having received no Determination in the Lord Keeper Wright's Time, was brought on before the Lord Keeper Cooper, who had been attended with Precedents on both Sides.

The Precedents produced for the Plaintiff, were Heyton verſus Marriot, and Woodcock verſus Weddall, and Foſter verſus Townley, in 1 Cro. 312. and Bridgman 35. where it was held, That one Truſtee ſhould not anſwer for the Receipts of another.

The Precedents produced for the Defendant, were Widnall verſus Bond and Richards, where the Caſe was, that Fulhurſt

hurſt deviſed his Eſtate to Lem and Richards in Truſt, for Payment of his Debts, and made them Executors, and they acted in the Truſt, and died, and Lem made the Defendant Bond his Executor, and Richards died, and made the Defendant Richards his Executor: And at the firſt Hearing of the Cauſe, it was decreed that all of them ſhould account for the ſeveral Receipts of their reſpective Teſtators; but upon Rehearing, 20 Jan. 8 W. 3. it appearing that the Defendants Teſtators had acted jointly, it was decreed, That a general Account ſhould be taken, and to be jointly anſwerable for what was received.

Another Caſe of Wilkins verſus Allen, 8 Dec. 3. Annæ Reg. Altho' Wilkins had received but the leſſer Part of what was received, yet that he ſhould be anſwerable for the whole which was received by his Co-Truſtee.

Another Precedent was of Murrel verſus Pitts, before the Maſter of the Rolls, where there were two Executors and Co-Truſtees who had joined in the Transfer of East India Stock, and one received 106, one Half of the Money, and the other received 106, the other Half; and this being ſtated in the Maſter's Report, and coming to be heard 5 Feb. 3 Ann. Reg. his Honour decreed, that each ſhould be anſwerable for the whole.

But the Lord Keeper ſaid, the Precedents being both Ways, he had no Rule to go by, but to follow thoſe which went upon the moſt ſolid Reaſons; and here it being agreed on all Hands, that the Plaintiff Fellows had only one Half of the Money, and that by the Conſent of the Defendant Mitchel, and there being no Colluſion, he thought it very hard, that a Truſtee, who acted honeſtly, ſhould be charged for more than he actually received, and ought not to be charged with the Receipts of his Co-Truſtee; and thereupon decreed, that upon Payment of his 1000 l. and Intereſt, he ſhould be diſcharged, and not anſwerable for what was received by Owen.

(357. b.)

A Perſonal Eſtate was deviſed to A. and in caſe ſhe died without Iſſue, then to B. Reſolved, that the Deviſe over to B. is void, and the whole decreed to A.

Lord Keeper. Perſonal Eſtate deviſed. Ante Caſe 44, 280.

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Term. S. Mich.
1705.
In Curia Cancellariæ.

(358.)

Best *versus* Stamford.

Lord Keeper.

Term to attend the Inheritance.

A Woman seised of an Estate in Fee, makes a Lease for 500 Years in Trust for herself, her Executors and Administrators; and being afterwards upon a Treaty of Marriage, she and her Trustees assign this Term in Trust for the Husband for Life, and after his Decease in Trust for her Life, and afterwards in Trust for their Children. The Husband dies, and the Wife surviving, and having no Issue by her first Husband, marries a second Husband, and dies: And the Question was between the second Husband and the Heir of the Wife, who should have this Term?

For the Husband it was insisted, That this was an abstracted Term carved out of the Inheritance, and declared to be in Trust for the Wife, her Executors and Administrators, and so when the Limitations in the Marriage Settlement were spent, it ought to go to the Executor or Administrator of the Wife, and that the second Husband being Administrator to the Wife ought to have it.

But per Cur. This Term, in the Creation of it, was a Term attendant upon the Inheritance; for whenever a Man is Owner of the Inheritance, and intitled to the Trust of a Term of the same Estate, the Term will be attendant upon the Inheritance, unless it be otherwise limited; and in this

Case,

Case, when the Husband and Wife are dead without Issue, all the Limitations in the Marriage Settlement are answered, and the Residue of the Term shall be attendant upon the Inheritance: And he said, in this Case it may in some Sense be said, that Æquitas sequitur Legem; for at Law, if a Term and the Inheritance come into one Hand, the Term is merged, and the Estate goes to the Heir; so in Equity it is in the Nature of a Merger, for the Trust of the Term will follow the Inheritance: And he said there was no Difference between this Case and that of Holt and Holt; for there a Man having a long Lease bought the Inheritance in the Name of Trustees, it was held that this Term was attendant upon the Inheritance, altho' there was no Declaration of it. And another Case of Percival and Zouch was cited to the same Purpose: Indeed when a Term was limited to raise 5000 l. for a Daughter, and after the Inheritance descended to her, and she made her Will, and disposed of the Portion during her Infancy, it was there held this was good enough; and that she being Owner of the Inheritance and the Term, and having a Power to dispose of the Term during her Infancy, but not of the Inheritance; it was in this Case held, that the Devise was good, and that for this Purpose it should be looked upon as a Term abstracted from the Inheritance. And so it was held in the Case of Thomas and Kemish. Ante Case 282.

S. C. more fully cited ante 209. See it also cited & stated in 1. P. Wms 374. See 1. P. Adj. acc. in 2. P. Wms 236.

Sir John Wolstenholm *versus* Davies. (359.)

At the Rolls.

Payment to a Scrivener. Ante Case 287, 317.

THE Plaintiff having borrowed 100 l. of the Defendant's Testator upon Bond, which was procured by Williams, a Scrivener in the Old Baily; when the Bond was sealed, it was delivered to the Obligee: The Plaintiff paid several Years Interest to Williams the Scrivener, and 50 l. Part of the principal Money, which the Scrivener paid to the Obligee, but the last 50 l. of the principal Money being paid to the Scrivener, he broke before he paid it to the Obligee; and the Question was, Whether Sir Jo. W. the Plaintiff was to lose the Money, or the Obligee? And the Master of the Rolls said, that it was the constant Rule of this Court, that if the Party, to whom the Security was made, trusted his Security in the Hands of the Scrivener, that Payment to the Scrivener was good Payment, but if he took the Security into his own Keeping, Payment to the Scrivener would not be good Payment, unless it could be

proved that the Scrivener had Authority from the Party to receive it: And altho' in this Case the Scrivener had received the Interest and Part of the Principal, and paid it to the Obligee, yet that did not imply that he had any Authority to receive it; but as long as he paid it over, all was well, and any one else might have carried to the Party as well as he; and the Plaintiff not proving that the Scrivener had any Authority from the Obligee to receive, he was forced to pay the last 50 l. again, altho' the Master of the Rolls declared that he thought it a very hard Case.

(360.)

Brotherton *versus* Hett.

At the Rolls.

Equitable Securities, which preferred.

IT was held, that of equitable Securities, that which is prior in Time shall have the Preference; as where there is a first, second and third Mortgage, the second Mortgage shall have the Preference of the third, if they are brought all before the Court; but if the last Mortgagee get the legal Estate before any Bill preferred, that will have the Preference of all the prior Mortgages which have not the legal Estate.

But that which made the Difficulty in this Case was, that the first Mortgagee, when the third Mortgagee lent his Money, had declared that he would, after the Payment of his own Money, stand seised of the mortgaged Estate in Trust for securing his Money, which he had not done to the second Mortgagee: And the Question was, Whether this had not put the third Mortgagee in a better Condition than the second: And of this Point the Master of the Rolls took Time to consider, but seemed to be of Opinion that this would not alter the Case, because the first Mortgagee had nothing to do with the Estate, after his own Money satisfied; but if he had joined with the Mortgagor in transferring the Mortgage for securing his own Money, and the Money of the third Mortgagee, this would have altered the Case. Cur. advisare vult.

DE
Term. Paſch.
1706.
In Curia Cancellariæ.

Sir Charles Orby *verſus* Dom. Moone. (361.)

Lord Keeper. Ch. J. Holt, Ch. J. Trevor.

THE Earl of Macclesfield by a Settlement of his Eſtate limited his Eſtate to the Lord Brandon for Life, Remainder to Fitz-Gerrard, his younger Brother for Life, and limited a Term to Truſtees, upon Truſt by Mortgage or Sale to raiſe 12000 l. viz. 8000 l. for the Lord Brandon Gerrard, and 4000 l. for Fitz-Gerrard, Remainder to his own Right Heirs, with a Power to the Lord Brandon and Fitz-Gerrard, when in Poſſeſſion, to let Leaſes of Lands uſually let at the antient and accuſtomed Rents, and of other Lands at the beſt improved Rents.

The Lord Macklesfield deviſed all his Eſtate, Real and Perſonal, to the Lord Moone, and made him Executor.

Fitz-Gerrard upon his Death-Bed made a Leaſe, being in Poſſeſſion, to Truſtees of all his Manors, Meſſuages, Lands and Tenements, which he had any Power to deviſe, rendring therefore for the Lands uſually let the old and accuſtomed Rents, and for the other Lands, the beſt improved Rents that could be got for the ſame. The Lord Brandon being dead, Fitz-Gerrard was in Poſſeſſion of the Eſtate for ſome Time. Here aroſe three Queſtions.

1ſt

1ſt Queſtion, Whether the Executor of Fitz-Gerrard ſhould have any Intereſt for the 4000 l. before the Money was raiſed by Mortgage or Sale?

In that they all agreed that he ought to have Intereſt from the Time the Money became payable, and this Term for raiſing it was in the Nature of a Mortgage or Security for it; but for the Time Fitz-Gerrard was in Poſſeſſion of the Eſtate no Intereſt was to be paid, for the Profits of the Eſtate were in lieu of it.

It was likewiſe agreed, that the Leaſes of the Lands, reſerving the improved Rents in general Terms, were void for the Incertainty, and for the Difficulty it put upon the Remainder Man, of recovering his Rent, becauſe he could not tell what Sum to bring his Action for.

But the only Queſtion was, Whether ſuch a Leaſe would be good for the Lands uſually letten, reſerving the antient and accuſtomed Rents in general Terms, without mentioning any particular Sum in the Reſervation? And here they differed in Opinions. Holt argued that thoſe Leaſes were good, and purſuant to the Power; for id certum eſt quod certum reddi poteſt, and altho' no particular Sum was reſerved, yet that might eaſily be aſcertained; for he held that ſuch Rent as was reſerved at the Time when the Power was created, ſhould be deemed the antient and accuſtomed Rent, altho' formerly it had been otherwiſe; for altho' that is not the moſt antient Rent, yet it may properly enough be ſaid to be the antient Rent, in reſpect to Leaſes which ſhould be afterwards made purſuant to the Power: And he ſaid he did not ſee any Reaſon why it ſhould not be good by uſing ſuch general Words in the Reſervation, as it was in creating the Power; for there the Power was in general Words, viz. reſerving the antient and accuſtomed Rent; and he cited the Abbot of Strata Marcella's Caſe, where the King granted tot, tanta & talia Privilegia, &c. as had been injoyed, &c. and it was held that it was a good Grant; and he cited 8 Co. Whitlock's Caſe, 6 Co. Sir John Molin's Caſe, Hard. Rep. 325. 5 Co. 7. Windham's Caſe, 5 Co. 18. And he ſaid the Execution of a Power ought to be taken beneficially, and therefore ſuch Conſtructions have been always made as to make it effectual. 6 Co. 6. Sir Edward Cleres's Caſe. Hob: 302. Keb. verſus Lee, 10 Co. 143. Where a Covenant to ſtand ſeiſed was conſtrued a good Revocation in Purſuance of a Power.

Power conſtrued beneficially.

Lord

Lord Keeper and Trevor argued econtra, that this was not a good Lease, for that this being a Power voluntarily created ought to be construed strictly, and if it be not good at Law, it shall not be aided in Equity.

They agreed this Reservation would have been good between the Parties themselves to the Lease; but the Question was, Whether this would be good against the Remainder Man? And possibly it might be good if such a Lease was made by a Tenant in Fee, so as to bind the Heir; but he, that acts by Virtue of a Power, ought strictly to observe all Circumstances, and for that they cited Montjoy's Case 5 Co. [Sed semble a moy, that some Opinions there are not Law now.]

In Construction of Deeds, the Intent of the Parties ought to be considered, and there is no Doubt but he that created the Power intended the Remainder Man should be in as good a Condition to recover the Rent as any other before him; for this will put great Difficulties upon the Remainder Man in Case he be put to bring an Action for the Rent; for if he mistakes the antient Rent ever so little, the Tenant may fence with him, and shew that some other Rent was the antient Rent, and be in no Danger of avoiding his Lease. Whereas if a certain Rent had been reserved, the Tenant could not controvert that without avoiding his own Lease; for if it were not the antient Rent, his Lease was void; and it can never be presumed that he would endeavour to avoid his own Lease; and the Rent ought to be the same not only in Quantity, but of the same Quality, and recoverable by the same Remedy. And the Execution of a Power ought not to be in the Words of creating the Power; for suppose the Power had directed the Leases to be made under the same Covenants, sure it would not have been good to make a Lease generally, saying under the same Covenants, without inserting any Covenant; or suppose the same had been upon an Alternative, reserving one or the other of two Things, it could not have been a good Execution of it, to have reserved it so in the Lease, but it must have been reduced to one of them; and as to the Case of Leviston and Piggot, which was cited by the other Side, where a Lease was made, reserving 20s. per Ann. they agreed that was good enough, because there by Admeasurement it was reduced to a Mathematical Certainty; and on this Side were cited 1 Cro. 340. Owen versus Ap-Rice, Winter's Case, Dyer, 5 Co. Knight's Case.

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